SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 570

THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY, APPELLANTS,

vs.

CITY OF DECATUR

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

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IN SUPERIOR COURT OF FULTON COUNTY

No. 91639

GEORGIA POWER COMPANY, GEORGIA RAILWAY & POWER COMPANY, GEORGIA RAILWAY & ELECTRIC COMPANY, Plaintiffs in Error,

vs.

CITY OF DECATUR, Defendant in Error

Bill of Exceptions—Filed Oct. 19, 1933. Filed in Supreme Court Nov. 1, 1933

GEORGIA,
Fulton County:

Be it remembered that on the 21st day of June 1933, at the regular term of the superior court of Fulton County, before the Honorable G. H. Howard, Judge of the Superior Court, Atlanta Circuit presiding, there came on to be tried before said court (the Superior Court of Fulton County) and a jury the case of City of Decatur against the Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company, the same being an action seeking to recover a judgment against each of said named defendants to collect a certain claimed paving assessment.

Be it further remembered that prior to the time just heretofore stated, and on the 31st day of March 1933, before the Honorable E. D. Thomas, Judge of the Superior court of Fulton County, Georgia, there came on to be heard in said case of City of Decatur vs. Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company motions made and filed by each of said named defendants to dismiss the petition filed in said case upon grounds set out and stated in a motion filed by each of said defendants in said case. That on the 31st day of March 1933, the said Honorable E. D. Thomas, Judge of the Superior Court of Fulton County presiding, overruled each of said motions filed by each of said named defendants upon each and all of the grounds of said motion to dismiss said petition.

To the judgments of said court overruling each of said motions filed by each of the said defendants, each of said [fol. 2] defendants filed their bill of exceptions pendente lite, the same being duly certified by the said Honorable E. D. Thomas, as required by law, the said bill of exceptions pendente lite being made a part of the record in said case.

To the rulings and judgments of said court overruling each of said motions of each of said defendants, as excepted to in said bill of exceptions pendente lite, each of the plaintiffs in error, Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, now assign error on the rulings and judgments of the court overruling the motions made by each of said plaintiffs in error to dismiss the petition in said case, and each of said plaintiffs in error say that the court erred, in not sustaining their said motions to dismiss said petition and erred in not sustaining said motions on each of the grounds of said motions, and plaintiffs in error now assign error upon said rulings of the court on each and all of the grounds taken by each of said plaintiffs in error in their exceptions pendente lite duly filed, certified to and made a part of the record in said case, and error is now assigned upon each of the grounds as set out in each of said exceptions pendente lite and upon said exceptions pendente lite.

Be it remembered that thereafter the said case (as heretofore stated) came on to be tried in the superior court of Fulton County, Georgia before the Honorable G. H. Howard, judge presiding and a jury, and on the 26th day of June 1933 the said court directed a verdict in favor of plaintiff and the jury upon the direction of the court found a verdict in favor of the plaintiff for the amount sued for in said case with interest thereon from June 21st, 1926, at the rate of 7 per cent. per annum, and upon direction of the court further found that the plaintiff was entitled to a decree against the Georgia Power Company and Georgia Railway & Power Company for the amount sued for and interest thereon, and upon said verdict as directed the said court, Honorable G. H. Howard presiding, did on the 26th day of June 1933 enter a decree in favor of the plaintiff in said case and against the Georgia Railway & Power Company and Georgia Power Company for the [fol. 3] amounts as above stated.

Each of the defendants in said case Georgia Railway & Power Company, Georgia Railway & Electric Company and Georgia Power Company thereafter in regular course and within the time provided by law each filed its motion for a new trial and each of said motions for a new trial filed by each of said defendants was thereafter duly and regularly amended, the grounds of the original and amended motions being approved by said court and said motions, as amended, being duly filed and made a part of the record in said case.

In regular course and within the time prescribed and provided by law plaintiffs in error had approved and filed as part of the record in said case a brief of evidence introduced in the hearing of said case. There was no charge of the court in said case for the court, after the conclusion of the evidence, directed a verdict in favor of the plaintiff in said case.

Said motion for a new trial, as amended, came on for a hearing before the Honorable G. H. Howard, Judge of said court presiding, on the 14th day of October 1933 and on said date (October 14th, 1933) the said court overruled each and all of the grounds of said original and amended motions for a new trial. To this judgment of the court overruling said original and amended motions for a new trial upon each and all of the grounds thereof, the defendants, Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company, now plaintiffs in error, excepted and now except and assign error thereon and say that the court erred in overruling said motion for a new trial, as amended, on each and all of the grounds therein stated and say that the court should have sustained said motion for a new trial upon each and every ground as set out in the original and amended motions for a new trial and each of said defendants, now plaintiffs in error, then excepted and now except and assign error upon said ruling of the court.

Specification of Record

Plaintiffs in error, and each of them, specify the following portions of the record in said case as material to a clear understanding of the errors set out and assigned in [fol. 4] this bill of exceptions and the bill of exceptions excepting to the errors set out and assigned in the bill of exceptions pendente lite heretofore referred to:

(1) The original petition in said case filed on the 17th day of November 1932;

(2) The answers and amended answers and pleas of the defendants, Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company;

(3) The motions filed by each of said defendants in the court below to dismiss the petition filed in said case and the ruling of the court overruling each of said motions to dismiss the petition;

(4) The exceptions pendente lite filed by each of the defendants in the court below to the order of the court overruling the motion to dismiss said petition, certified to and filed as part of the record in said case on the 10th day of April 1933, together with the certificate and order of the court making said exceptions pendente lite a part of the record in said case;

(5) The motion for a new trial in said case, together with the order thereon;

(6) The amended motion for a new trial, together with the order thereon;

(7) The brief of the evidence in said case, with the order of approval and the orders and entries thereon;

(8) The verdict of the jury as entered in said case;

(9) The decree of the court entered upon said verdict;

(10) The judgment of the court overruling the motion for a new trial, as amended, on the 14th day of October, 1933.

And now within the time allowed by law and within 20 days from the overruling of the motion for a new trial in said case, come Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, plaintiffs in error, and present this their bill of exceptions, and pray that the same may be signed and certified as provided by law, that the errors alleged to have been committed may be considered and corrected by the [fol. 5] Supreme Court of Georgia.

Colquitt, Parker, Troutman & Arkwright, Attorneys for plaintiffs in error, Georgia Railway & Electric

Company, Georgia Railway & Power Company, Georgia Power Company. Post office address: 1607 William Oliver Building, Atlanta, Georgia.

JUDGE'S CERTIFICATE

I do certify that the foregoing bill of exceptions is true and specifies all of the evidence and specifies all of the record material to a clear understanding of the errors complained of in this bill of exceptions and the clerk of the superior court of Fulton County is hereby ordered to make out a complete copy of the portions of the record in said case which are in said bill of exceptions specified and certify the same as such and cause the same to be transmitted to the present term of the Supreme Court of the State of Georgia that the errors alleged to have been committed may be considered and corrected.

This the 19th day of October 1933.

G. H. Howard, Judge S. C. A. C.

Acknowledgment

Due and legal service of the foregoing bill of exceptions is hereby acknowledged, copy received and all other and further notice and service is hereby waived.

This 19th day of October.

Branch & Howard, Howell, Heyman & Bolding, Attorneys for defendant in error.

[File endorsement omitted.]

[fol. 6] Clerk's certificate to foregoing bill of exceptions omitted in printing.

[File endorsement omitted]

[fol. 7] IN SUPERIOR COURT OF FULTON COUNTY

PETITION—Filed Nov. 17, 1931

GEORGIA,
Fulton County:

To the Superior Court of said County:

The petition of the City of Decatur, a municipal corporation of the State of Georgia, shows as follows:

1. Defendants are Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company.

2. Each of said defendants is a corporation having its principal place of business and agents in Fulton County, Georgia.

3. Georgia Power Company is a consolidated corporation chartered under the laws of the State of Georgia and particularly under the provisions of the law as contained in Sections 2607 et seq. of the Civil Code of Georgia, and is composed of certain constituent corporations, among others being Georgia Railway & Power Company and Georgia Railway & Electric Company.

4. The charter creating said consolidated corporation under the name of Georgia Power Company was granted by the Secretary of State of the State of Georgia on February 25th, 1927.

Georgia Railway & Electric Company formerly owned and operated a street car system in the City of Atlanta, Fulton County, Georgia, and in the City of Decatur, DeKalb County, Georgia, and as a part of said system operated lines between Atlanta and Decatur and other points near Atlanta.

6. On, to wit: January 1st, 1912, Georgia Railway & Electric Company by lease contract conveyed and leased to Georgia Railway & Power Company for the term of nine hundred ninety-nine (999) years all of its property of every kind, consisting of its street car system, franchises and all other real and personal property, the said lease among other things providing:

"The lessor doth hereby grant, demise and lease unto the lessee all and singular its railroads, electric power and steam heating plants and systems, lands, franchises, contracts and other property of every description, real and personal; now owned or hereafter to be acquired by the lessor, and all its franchises, rights, privileges, easements, [fol. 8] permits, licenses and appurtenances thereunto belonging or otherwise, including the right to demand and receive to the lessee's own use all tolls, rents, revenues, income and profits, but excepting its corporate seal and books of record and account, and its deeds, grants, plat and other

instruments and documents containing or constituting the evidence of its right and title to the property now or hereafter owned or operated by it; and excepting the shares of stock and bonds of other corporations now or hereafter owned by the lessor, but including all the income derived or receivable from such shares and bonds (all of which are hereinafter referred to as the demised premises).

"Provided always that this lease be subject to the several mortgages now existing upon all or any part of the demised premises.

"To have and to hold the same unto the lessee, its successors and assigns, for the term of 999 years from the 1st of January 1912.

Lessee's Covenants

The lessee covenants that it will pay, satisfy and discharge as the same shall become due and payable all taxes, rates, charges, licenses and assessments, general and special, ordinary and extraordinary, of every nature and description which have been or may be lawfully imposed or assessed during the continuance of this lease in any way upon the lessor or upon the lessee, either with reference to the capital stock or income of the lessor, or to the property, earnings, contracts, rights, privileges or franchises hereby demised, or to the sum of money payable by the lessee hereunder the shareholders of the lessor or otherwise; and also that it will pay all sums of money which the lessor now may be or hereafter become liable to pay by law, contract or otherwise, for the possession, enjoyment or perpetuation of any *of any* of its rights, powers, privileges, or franchises; said payments to be made as the same become due to the officers of other persons entitled by law to receive the same; and in the event that the lessee shall fail to make any such payments when the same become due, the lessor may at any time thereafter make such payments and recover the amount thereof with interest thereon from [fol. 9] the date of such payments and all costs, attorney's fees and other expenses from the lessee, without prejudice to any rights secured to the lessor by this lease for breach of any covenants hereof, it being understood and agreed however, that, if the lessee shall desire to resist by legal proceedings the payment of any tax or assessment, and shall no notify the lessor and the lessee shall commence

such legal proceedings in good faith the lessor shall not pay nor shall the lessee be obliged to pay any such tax or assessment until 30 days after the final adjudication thereupon by the court having jurisdiction in such case, and, in the event that the lessee shall take an appeal from any adjudication upon such tax or assessment, then the lessor shall not pay nor shall the lessee be obliged to pay such tax or assessment until 30 days after final adjudications upon such appeal.

"23. The lessee hereby assumed all the contracts and other obligations of the lessor and covenants that it will pay all the indebtedness of the lessor shown by its books and records, and also covenants that it will assume and pay all other debts, obligations and liabilities, both present and future, of the lessor (except the principal of bonds and except any liabilities incurred by the lessor contrary to its covenants herein contained, but including all obligations to pay and provide sinking funds) and all the liabilities of the lessor for injuries or damages to persons or property, and that it will defend, at its own expense, all actions now pending or hereafter brought against the lessor on account of claims for such liabilities, the lessee to be subrogated, however, to the benefit of any contract or undertaking with any person or persons indemnifying or protecting the lessor against such indebtedness and liabilities; and also that it will pay all the interest and sinking fund charges on all bonds of the Atlanta Gas Light Company and of the Atlanta Northern Railway Company, now outstanding or that may hereafter be issued with the consent of the lessee.

"26. The lessee further covenants that it will perform all the obligations imposed upon the lessor by law or by [fol. 10] the provisions of its grants from or contracted with any State, city, town or county, in relation to the demised premises, and not do or suffer to be done or omitted any act or things which shall be ground for forfeiture of any of the franchises, rights and privileges or easements derived thereunder for the construction and maintenance and operation of said street suburban and interurban railroads, electric power and steam heating plants and systems, or any part thereof, of which the lessee shall at any time be in possession under this lease, or which shall be a breach of any condition or obligation

on imposed upon the lessor by the mortgages of the lessor, or by any other contract entered into by the lessor; and that the lessee will not suffer, permit or consent to any alterations or changes in any such franchises, rights or privileges without the written consent of the lessor; and said lessee shall and will hold the lessor harmless from all liability, cost or expense arising during the terms hereby created for or upon the bonds, if any, heretofore or hereafter executed to any city, town, or county conditioned for the faithful performance of the obligations of the lessor under its grant form or contract with any such city, town or county."

7. Part of the property conveyed by said lease to Georgia Railway & Power Company was a street car line and franchises in the City of Decatur, located partly on what is known as East Ponce de Leon Avenue in the City of Decatur.

8. On, to wit: the 15th day of May, 1925, it was ordained by the Commissioners of the City of Decatur as follows:

"Whereas, the Commissioners of the City of Decatur, by virtue of the authority granted them under the charter of said city, have full power and authority, in their discretion, to grade, pave, macadamize, or otherwise improve the travel and drainage of the streets, squares, public alleys and lanes of said city; and,

"Whereas, it is necessary for the public travel and drainage of said streets, that the same should be improved; and,

"Whereas, it is the judgment of the Commissioners of [fol. 11] said city, and by this ordinance they so declare, that the pavement of said streets with 5" Asphaltic Concrete, and with granite cubes between the tracks of the street car company and for two (2) feet on each side thereof, and that granite cubes and ties of the car tracks be firmly set in a concrete base and the cubes grouted with asphaltic or cement, according to the specifications and plans of the City Engineer, will properly improve said streets for the travel and drainage thereof, and that such improvements are necessary for such travel and drainage; and,

"Whereas, the Commissioners of the said city are authorized under the charter of said city, to assess the cost,

in full, for the paving between the tracks and for two (2) feet on each side thereof of the Street Railway Company, and to assess the remaining cost of said paving against the real estate abutting on such street; one-half of such remaining cost to be assessed against the real estate abutting on one side of said Streets, and one-half of said remaining cost to be assessed against the real estate abutting on the other side of said streets, where paved.

"Therefore be it ordained by the Commissioners of the City of Decatur, and it is hereby ordained by authority of the same, that North Oak Street from East Howard Avenue to East Ponce de Leon Avenue and East Ponce de Leon Avenue from East Court Square to Sycamore Drive be improved by paving the same with 5" Asphaltic Concrete and with granite cubes between the tracks of the Street Railway Company, and for two (2) feet on each side thereof, and that the granite cubes and ties of the car track be firmly set in a concrete base and the cubes grouted with asphalt or cement.

"Be it further ordained, that when said street has been so improved, the City Manager of said city, shall make up an assessment roll of the cost of such improvement, showing the total cost thereof and showing the total cost between the tracks of said Railway Company and for two (2) feet on each side thereof, and showing the remaining cost of such improvement; that is the cost after deducting from the total cost the cost of the paving of said tracks and for two (2) feet on each side thereof and showing the [fol. 12] number of feet of real estate abutting on each side of said streets, where paved, and the cost per lineal foot on each side of said streets, where paved, as provided by the charter of said city.

"Be it further ordained, when the City Manager shall furnish to the Commissioners such assessment roll, they shall adopt an ordinance making an assessment against the Georgia Railway & Power Company for the total cost of the pavement between the tracks of said Company and for two (2) feet on each side thereof; against the real estate abutting on each side of said streets, and against the owners thereof at the time of making said assessment; such remaining cost.

"Be it further ordained, that such assessment be a lien against said Street Railway Company and against said property from the time of making said assessment, in terms of the charter of said City.

"Be it further ordained, that upon adoption of said ordinance making said assessment, the Clerk of the Commissioners shall notify the respective owners of such property, and the Georgia Railway & Power Company, the amount of the assessment against their said properties, and he shall give them ten (10) days in which to make payment thereof and after ten (10) days he shall issue fi. fas. against the property, and the said owners thereof and against the Georgia Railway & Power Company for all assessments which may be in default as provided by the charter of said city, which fi. fas. shall be turned over to the Marshal of said city for levy and sale, if not paid.

"Be it further ordained, that said Clerk shall publish notices of the introduction of this ordinance notifying the public and parties interested by publication in DeKalb New Era, one time, at least ten (10) days before the adoption of this ordinance, and such notice shall contain a statement of the street to be improved, the kind of pavement to be made; the date of the meeting of the Commissioners at which such ordinance will be considered for adoption, and the same may be adopted at such meeting, or some subsequent meeting, in the discretion of the Commissioners, and any person interested in such improve-
[fol. 13] ment may file his objection to the adoption of such ordinance with the City Clerk and be heard by said Commissioners, if he may desire to appear and be heard.

"Be it further ordained, that all ordinances or parts of ordinances in conflict herewith be, and the same are hereby repealed."

9. And subsequently, to wit: on May 21st, 1926, after the paving as provided for in said ordinance had been completed, an ordinance was adopted by the Commissioners of the City of Decatur, as follows:

"Whereas, the Commissioners of the City of Decatur by ordinance adopted May 15, 1925, providing for paving East Ponce de Leon Avenue, from East Court Square to Sycamore Drive, in the City of Decatur; and

"Whereas, said ordinance provided for the cost of paving between the tracks of the Georgia Railway & Power Company, and for two (2) feet on each side thereof be assessed against the Georgia Railway & Power Company, and provided, that one-half of the remaining cost for paving said avenue be assessed against the real estate abutting on the North side of said Avenue, and that the other one-half of said remaining cost be assessed against the real estate abutting on the south side of said Avenue; and

"Whereas, said East Ponce de Leon Avenue has been paved by the City of Decatur in accordance with said ordinance, adopted on May 15th, 1925; and,

"Whereas, the total cost of paving said avenue, according to the assessment roll of the City Manager, is $42,-242.07 and,

"Whereas, the cost of paving between the tracks of the Georgia Railway & Power Company and for two (2) feet on each side thereof is $13,444.66; and

"Whereas, one-half of the remaining cost of paving said avenue, is $14,397.70; and

"Whereas, there are 3699.92 feet of real estate abutting on the north side of said avenue, and 3699 feet of real estate abutting on the south side of said avenue; and

"Whereas, the cost per lineal foot be assessed against the real estate abutting on the north side of said avenue, is $3.89½ per foot; and

[fol. 14] "Whereas, the cost per lineal foot be assessed against the real estate abutting on the south side of said avenue, is $3.89½ per lineal foot;

"Therefore be it ordained by the Commissioners of the City of Decatur, and it is hereby ordained by authority of the same that for the paving of said Ponce de Leon Avenue between East Court Square and Sycamore Drive, the sum of $13,444.66 is hereby levied and assessed against the Georgia Railway and Power Company, and against the property of said Company, and the same being the cost of paving between tracks of said Company and for two (2) feet on each side thereof, as said tracks run in and along said avenue.

"Be it further ordained by the authority aforesaid, that the sum of $3.89½ per lineal foot is hereby levied and assessed against the real estate abutting on the north side of Ponce de Leon Avenue from East Court Square to Syca-

more Drive, for the paving of said avenue, the same amounting to the sum of $14,397.70, and for one-half of said remaining cost for the paving of said avenue.

"Be it further ordained by the authority aforesaid, that the sum of $3.89½ per lineal foot is hereby levied and assessed against the real estate abutting on the south side of Ponce de Leon Avenue from East Court Square to Sycamore Drive, for the paving of said Avenue the same amounting to the sum of $14,397.70, for one-half of said remaining cost for the paving of said avenue.

"Be it further ordained, that the city clerk shall give notice to the Georgia Railway & Power Company the amount of the assessment made against said company for the paving of said street, and give them ten (10) days in which to make payment thereof.

"Be it further ordained, that the city clerk shall give the owners of the real estate abutting on said avenue between East Court Square and Sycamore Drive the amount of the assessment against their respective properties, and give them ten (10) days in which to make payment thereof.

"Be it further ordained, that after the expiration of said ten (10) days, the city clerk shall issue an execution against the Georgia Railway & Power Company for the cost of [fol. 15] paving between its tracks and for two (2) feet on each side thereof, if said company shall be in default in making payment of said assessment, and shall likewise issue executions against the respective parcels of real estate abutting on said avenue between East Court Square and Sycamore Drive, and against the owners thereof, if such owners are in default after said ten (10) days, and shall turn all such executions over to the Marshal of said city who shall proceed to make collections thereof by levy and sale, as provided by the charter of the City of Decatur.

"Be it further ordained, that all ordinances and parts of ordinances in conflict herewith be and the same are hereby repealed."

10. During all of said time; that is, when said ordinances, as hereinabove referred to, were adopted and when the paving work was completed, the defendant, Georgia Railway & Power Company, was in possession of all of the property, rights and franchises of the defendant, Georgia Railway & Electric Company, under and by virtue of the nine hundred and ninety-nine (999) year lease hereinabove referred to.

11. Georgia Railway & Power Company neglected, failed and refused to pay the assessment against it under said ordinances above set out, and in accordance with the provisions of the assessment ordinance, above set out, a fi. fa. was issued by the clerk of the City of Decatur as follows:

"State of Georgia County of DeKalb. City of Decatur.

"To the Marshal of City of Decatur, Greetings:

"Whereas, the Commissioners of the City of Decatur on May 15th, 1925, provided for the paving between the tracks of the Georgia Railway & Power Company and for two (2) feet on each side thereof with assessment of cost thereof against said Georgia Railway & Power Company and

"Whereas, the Commissioners of the City of Decatur on May 21st, 1926, after the paving of said East Ponce de Leon Avenue had been completed did by ordinance make an assessment against the Georgia Railway & Power Company for the cost of paving between its track and for 2 feet [fol. 16] on each side thereof on said Ponce de Leon Ave; the cost of said paving between the tracks of said Company, and for 2 feet on each side thereof amounted to $13,444.66.

"Now, therefore, you are hereby commanded that of the goods and chattels, lands and tenements of the Georgia Railway & Power Company, a corporation of the State of Georgia, you cause to be made by levy and sale thereof, the sum of $13,444.66, the amount of the assessment of the Commissioners of the City of Decatur against said Georgia Railway & Power Company, made and assessed on the 21st day of May, 1926, for the paving of East Ponce de Leon Avenue in said city, between the tracks of the Georgia Railway & Power Company, and for 2 feet on each side thereof in accordance with the laws and ordinances of the City of Decatur. Also $1.50 costs for issuing and collecting this execution and a sufficient amount to cover interest on said sum of $13,444.66 at the rate of 7% per annum from the date of this execution until satisfied together with all other costs which may hereafter accrue, as provided by law; and have you this execution and said sums before the Commissioners of said city in payment of said assessment in accordance with the laws and ordinances of said city.

"Witness the Honorable Commissioners of the City of Decatur.

"Given under my hand and seal of the City of Decatur, this 21st day of June, 1926.

J. S. Loony, City Clerk."

12. Thereafter, on July 6th, 1927, the said fi. fa. was by M. D. Goodger, marshal af the City of Decatur, levied upon property located in the City of Decatur, and described as follows:

"All that tract or parcel of land lying and being in the City of Decatur in Land Lot No. 235, in the 15th District of DeKalb County, Georgia, and more particularly described as follows:

"Beginning at a point on the southern side of College Ave 208 feet northeasterly from the southeast corner of College Ave and Candler Street, and running thence northeasterly along the southern side of College Ave 83 feet, to the lot of C. G. Harrison; thence southeasterly along the [fol. 17] western side of the Harrison lot 243 feet, more or less, to an alley; thence southwesterly along the northern side of said alley 79.1 feet; thence northwesterly 7.5 feet to an 8 foot alley; thence northeasterly along the eastern side of said alley 196.2 feet to the point of beginning.

"Levied on as the property of the Georgia Railway & Power Company, a corporation, to satisfy fi. fa. in favor of the City of Decatur and against the said Georgia Railway & Power Company and against the property of said Georgia Railway & Power Company for the paving between the tracks of the Georgia Railway & Power Co. and for 2 feet on each side thereof, on Ponce de Leon Avenue from Oak Street to Court House Square in said City of Decatur. Georgia Railway & Power Company notified of this levy."

13. The property levied upon as aforesaid, was held by Georgia Railway & Power Company as a part of the properties conveyed to it by the nine hundred ninety-nine (999) year lease, hereinabove referred to, said property having at the time of the execution of said lease belonged to the defendant, Georgia Railway & Electric Company.

14. Said property had and has located upon it what is known as a substation, which is used by the defendants in connection with the operation of its street car and electric lighting systems in and around the City of Decatur; the same was located near the Georgia Railroad Depot in the

City of Decatur but does not abut upon East Ponce de Leon Avenue, the street paved under and by virtue of the ordinances hereinabove referred to.

15. Said levy, above referred to, having been made, the Georgia Power Company, the consolidated corporation which had been organized and chartered as hereinabove set forth, filed a statutory claim to said property, which statutory claim was subsequently amended by the filing of a bill in equity in aid thereof.

16. Georgia Power Company claimed title to said property under and by virtue of the consolidated agreement under which it, Georgia Power Company, was organized and chartered as hereinabove set out.

[fol. 18] 17. Georgia Power Company in its said claim, among other things, claimed that said property was not subject to levy and sale by reason of the fact that the same was a necessary part of the property used by it and in connection with its duties as a quasi-public service corporation.

18. Under the provisions of the consolidation agreement and of the charter under which the defendant, Georgia Power Company, was organized, it is provided:

"XI. Upon the making and perfecting of this joint agreement and the filing of the same in the office of the Secretary of State, and upon the issuance by the Secretary of State of his certificate that the provisions of Sections 2607, 2608 and 2609 of the Code of Georgia of 1910 have been complied with the Consolidated Corporation shall thenceforth constitute a corporation by the name provided in this joint agreement. Then and thereafter the Consolidated Corporation shall be possessed of all the rights, privileges, powers and franchises as well of a public as of private nature, and be subject to all the duties, liabilities, debts and obligations of each of the Constituent Corporations participating in this joint agreement and thereupon the corporate franchises, entity and existence of the Constituent Corporations shall pass to and be consolidated into the Consolidated Corporation and the Consolidated Corporation shall be fully vested therewith and the corporate existence of the Constituent Corporations shall cease except as consolidated into the Consolidated Corporation or as

may be requisite for carrying out the purposes of this joint agreement or as continued by statute.

"XII. Upon the taking effect of this joint agreement, all and singular the rights, privileges and franchises of each of the Constituent Corporations and all property, real, personal and mixed, and all debts due on whatever account, as well for stock subscriptions, and all other things in action of or belonging to each of the Constituent Corporations, shall be and hereby are granted, conveyed, assigned, transferred and vested in the Consolidated Corporation its suc- [fol. 19] cessors and assigns, without further act or deed; and all rights, properties, privileges and franchises and all and every other interest shall be thereafter as effectually and property of the Consolidated Corporation as they were of the Constituent Corporations and the title to any of the real estate vested in the Constituent Corporations, whether by deed or otherwise, shall not revert or be in any way impaired by reason of this joint agreement or of the consolidation of the Constituent Corporations into the Consolidated Corporation; provided, that the rights of creditors and all liens upon the property of the Constituent Corporations shall be preserved unimpaired, but limited in lien to the property affected by such liens at the time this joint agreement shall become effective, and the Constituent Corporations may be deemed to continue in existence in order to preserve the same; and all debts, liabilities and duties of the Constituent Corporations shall thenceforth attach to the Consolidated Corporation and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it."

"If at any time the Consolidated Corporation shall deem it advisable or be advised that any further assignments, assurances in the law or other acts and instruments are necessary or desirable to vest in the Consolidated Corporation, its successors and assigns, the title to any property of the Constituent Corporations and their proper officers and directors shall and will do all such acts and things as may be necessary or proper to vest the title to such property in the Consolidated Corporation, or its successors or assigns, and otherwise to carry out the purposes of this joint agreement."

19. The claim case hereinabove referred to came on for hearing in DeKalb superior court, and the trial in DeKalb

superior court resulted in a verdict and judgment in favor of the City of Decatur, but the claimant, Georgia Power Company, appealed said case to the Supreme Court of Georgia and the judgment rendered in DeKalb superior court was by the Supreme Court of Georgia reversed.

20. Thereafter, the case came on for trial again in De- [fol. 20] Kalb superior court and that trial resulted in a verdict against the Company and in favor of the City of Decatur, holding, in effect, that said property was subject to the fi. fa.

21. From this judgment the claimant, Georgia Power Company, again appealed to the Supreme Court of Georgia, and the Supreme Court of Georgia again reversed the judgment, holding, in effect, that said property was not subject to levy and sale for the reason that it was a necessary part of the property and equipment of the Georgia Power Company in connection with its service as a quasi-public service corporation.

22. Petitioner shows that under the law it cannot levy upon the tracks of the street car line located in the City of Decatur for the reason that these tracks constitute a part of the main line of the street car system operated by the defendants to and through the City of Decatur.

23. Petitioner shows further that the defendants have no property located in the City of Decatur, which is subject to levy and sale because of the fact that all such property is used in connection with the business of the defendants as a quasi-public service corporation.

23. Petitioner is therefore without any legal remedy for the enforcement of said assessment and fi. fa. and the collection of the amount due to it by the defendants, as herein set out.

24. The defendant, Georgia Power Company, the consolidated corporation, is under the legal duty and obligation to pay said assessment, but as hereinbefore set out it fails and refuses to pay the same.

25. Petitioner being legally entitled to collect said assessment and defendant being under the obligation to pay the same, but petitioner being without any legal means or remedy to enforce the payment of the same, it is compelled to seek the aid of a court of equity.

Wherefore, Petitioner prays that process issue requiring said defendants, and each of them, to be and appear at the next term of this court to answer this complaint; that the court by its proper decree in this cause decree that the plaintiff is entitled to the collection of the amount due to it as aforesaid; that is, the amount of said assessment, to-
[fol. 21] gether with legal interest thereon since the same was due; and that the court further decree that the defendants are under the legal duty and obligation to pay the same; and that judgment be rendered against said defendants for the amount of said indebtedness; and that a decree be molded so as to provide that the plaintiff is entitled to collect the same out of any property of the defendant that may be found subject to levy and sale; and petitioner prays that such other and further relief be granted to it as may be necessary to the end that the defendants be required and compelled to pay the plaintiff and the plaintiff be enabled to recover and collect of the defendants the amount due to the plaintiff as set forth in this petition.

Branch & Howard, Petitioner's Attorneys.

In Superior Court of Fulton County

[Title omitted]

Summons

To the Sheriff or his Deputy of said County, Greeting:

The defendants are hereby required, personally or by attorney to be and appear at the superior court, to be held in and for said county, on the first Monday in January, 1932, then and there to answer the plaintiff's complaint, as in default thereof said court will proceed, as to justice shall appertain.

Witness, the Honorable John D. Humphries, Judge of said court, this 17 day of Nov., 1931.

Geo. F. Haney, Deputy Clerk.

[fol. 22] [File endorsement omitted]

Georgia,
Fulton County:

Served the defendant Georgia Railway & Electric Co., a corporation by serving P. S. Arkwright, Pres., by leaving

a copy of the within writ and process with him at the office and place of doing business of said corporation, in Fulton County, Ga.

This Nov. 20, 1931.

D. M. Goodlin, Deputy Sheriff.

GEORGIA,
Fulton County:

Served the defendant Georgia Railway & Power Co. by serving P. S. Arkwright, Pres., by leaving a copy of the within writ and process with him at the office and place of doing business of said corporation, in Fulton County, Ga.

This Nov. 20, 1931.

D. M. Goodlin, Deputy Sheriff.

GEORGIA,
Fulton County:

Served the defendant Georgia Power Co., a corporation by serving Miss Marion Edwards, Chief Clerk, by leaving a copy of the within writ and process with her at the office and place of doing business of said corporation in Fulton County, Ga.

[fol. 23] This Nov. 19, 1931.

D. M. Goodlin, Deputy Sheriff.

IN SUPERIOR COURT OF FULTON COUNTY

No. 91639

CITY OF DECATUR

vs.

GEORGIA POWER COMPANY, GEORGIA RAILWAY & POWER COMPANY and GEORGIA RAILWAY & ELECTRIC COMPANY

ANSWER—Filed Jan. 22, 1932

And now come Georgia Power Company and Georgia Railway & Power Company and Georgia Railway & Electric Company and each of said corporations file the following as its separate plea and answer in said suit and for said plea and answer say:

(1) Defendants, and each of them, admit the allegations of paragraphs 1 and 2 of the petition.

(2) In answer to paragraph 3 of the petition defendants and each of them, admit that the Georgia Power Company is a corporation, chartered under the laws of the State of Georgia and admit that several other constituent corporations were consolidated into the Georgia Power Company under and by virtue of the laws of the State of Georgia. Defendants, and each of them, say that the charter of the Georgia Power Company was granted by the Secretary of the State of Georgia and that the court will take judicial cognizance of said charter and its provisions. Defendants, and each of them, deny the allegations of paragraph 3 of the petition in so far as they may in any way conflict with the charter of the Georgia Power Company.

(3) Defendants, and each of said defendants, deny the allegations of paragraph 4 of the petition.

(4) Defendants, and each of said defendants, deny the [fol. 24] allegations of paragraph 5 of the petition.

(5) In answer to paragraph 6 of the petition, defendants, and each of said defendants, admit that on the 1st day of January 1912, the Georgia Railway & Electric Company executed a lease to the Georgia Railway & Power Company and each of said defendants admit that portions of said lease are set out in said paragraph.

(6) In answer to paragraph 7 of the petition defendants, and each of said defendants, say that by virtue of said lease the Georgia Railway & Power Company operated a street car line in Decatur under a franchise granted by the City of Decatur. That said line was located in the municipality and located partly on what is known as East Ponce de Leon Avenue in the City of Decatur.

(7) In answer to paragraph 8 of the petition defendants, and each of said defendants, admit that on the 15th day of May 1925, the Commissioners of the City of Decatur enacted the purported ordinance as set out in said paragraph. For the reasons hereinafter set out each of said defendants deny that said purported ordinance authorizes or permits the instant suit and allege that if it is construed as contended by plaintiff it is invalid, illegal and unconstitutional as hereinafter set out. Each of said defendants

alleges that said purported ordinance, and the acts under which the same is claimed to have been passed, if construed as contended for by plaintiff in the instant suit, are illegal and invalid and unconstitutional and violative of the constitutional provisions of the State of Georgia and of the constitutional provisions of the United States as hereinafter set out.

(8) In answer to paragraph 9 of the petition, each of the defendants say that said paragraph sets out a correct copy of a purported ordinance, but as hereinafter set out defendants allege that said purported ordinance, and the acts under which the same is claimed to have been passed, if construed as contended for by plaintiff in the instant suit, are illegal and invalid and unconstitutional and violative of the constitutional provisions of the State of Georgia [fol. 25] and of the constitutional provisions of the United States as hereinafter set out.

(9) In answer to paragraph 10 of the petition each of said defendants deny said paragraph as alleged. Each of the defendants admit that at the time of the adoption of said purported ordinances the Georgia Railway & Power Company was in possession of the car line in the City of Decatur and the franchise under which it was constructed and operated, which, as heretofore stated, was located within the municipality of Decatur and partly located on what is known as East Ponce de Leon Avenue in the City of Decatur.

(10) In answer to paragraph 11 of the petition each of the defendants deny said allegations as alleged. Each of said defendants say that the special paving assessment sought to be made against the Georgia Railway & Power Company under said ordinance were and are illegal and invalid and unconstitutional for the reasons hereinafter set out and that the said fi. fa. as issued against the Georgia Railway and Power Company is illegal, invalid and unconstitutional. Each of said defendants admit that said paragraph sets out a correct copy of the purported fi. fa. issued by the clerk of the City of Decatur, but each of said defendants say that said fi. fa. was and is illegal and unconstitutional for the reasons hereinafter set out.

(11) In answer to paragraph 12 of the petition each of said defendants admit that said fi. fa. was levied upon

certain property located in the City of Decatur as described in said paragraph.

(12) In answer to paragraph 13 of the petition each of said defendants admit the allegations as therein alleged.

(13) In answer to paragraph 14 of the petition each of said defendants say that said paragraph is substantially correct.

(14) In answer to paragraph 15 of the petition each of said defendants admit that said paragraph is substantially correct.

(15) In answer to paragraph 16 of the petition it is admitted that the Georgia Power Company claimed title to the property levied on.

[fol. 26] (16) In answer to paragraph 17 of the petition each of said defendants admit that said claim as filed by the Georgia Power Company, among other things claimed that the property levied on was not subject to levy and sale under the assessment and fi. and fa. in question.

(17) In answer to paragraph 18 of the petition each of the defendants admit that a part of the consolidated agreement is correctly set out in said paragraph.

18. In answer to paragraphs 19 and 20 of the petition each of said defendants admit the allegations as therein set out.

19. In answer to paragraph 21 of the petition each of said defendants admit that the Georgia Power Company appealed said case to the Supreme Court of Georgia and that the Supreme Court rendered a judgment reversing the rulings of the trial court. Each of the defendants say that the rulings of the Supreme Court of Georgia are questions of law and the judgment as rendered therein speaks for itself.

(20) In answer to paragraph 22 of the petition each of said defendants deny said paragraph. Each of said defendants say that prior to the passage or adoption of any of the claimed ordinances and prior to the special paving assessment, and prior to the issuing of the fi. fa. in question, the Georgia Railway & Electric Company and the Georgia Railway & Power Company notified the plaintiff that the special

paving assessment as contemplated would vastly exceed the entire value of the street railway lines located and being operated within the territorial limits of plaintiff, taking into consideration all improvements which in any way resulted or could result from the street paved and offered to surrender to the plaintiff its street railway lines and franchises therein without the necessity of any levy or sale thereof and tendered to plaintiff the entire line located within the municipality of Decatur, together with the franchise to construct and operate the same, but the same was refused by the plaintiff. Continuous since said time defendants have made a continuing tender of said Street [fol. 27] Railway lines located in the territorial limits of Decatur, together with the franchise under which they were constructed and operated in payment or satisfaction of the paving assessment in question, and now and here tender and makes a continuing tender of the same. Each of said defendants say that under said tender and continuing tender there is and can be no necessity for the plaintiff to levy upon the tracks of the street railway lines located in Decatur and by virtue of said tender and continuing tender plaintiff cannot claim any rights under the allegations as set out in paragraph 22 of the petition. Defendants assert that the only reason plaintiff will not accept the entire street railway lines located within the limits of plaintiff, together with the franchise, in payment of the special paving assessment in question, is because the entire value of said line and franchise is laws than the said claimed special paving assessment.

(21) In answer to paragraph 23 of the petition each of said defendants deny said allegations. Defendants say that as set out and alleged in the preceding paragraph of this answer, and as hereinafter set out, the defendants have never made any contention that plaintiff cannot levy upon the street railway lines and franchises in Decatur but have tendered and makes a continual tender of the line and franchise to the plaintiff.

(22) Each of said defendants deny the allegations of paragraphs 23, 24 and 25 of the petition.

(23) The plaintiff in enacting the claimed ordinances, and in making the claimed special paving assessment and in issuing the fi. fa. in question are proceeding under and by

virtue of the Acts of the Legislature of the State of Georgia, Acts 1919, page 834, et seq. and the Acts of the Legislature of the State of Georgia approved August 12, 1924, Georgia Laws 1924, page 534; the same being amendments of the charter of the plaintiff. Each of the defendants say that if said acts and said ordinances and said fi. fa. be so construed as to allow the plaintiff the relief prayed [fol. 28] for in this suit that then the said Acts of 1919 and the said Acts of 1924 and the said ordinances with reference to the special paving assessment against any of the said defendants and the said special paving assessment against any of said defendants, are illegal and void and unconstitutional and violative of the State and Federal Constitutional provisions hereinafter set out.

(24) Georgia Constitutional provision Article 7, Section 2, Paragraph 1, codified in Georgia Code Section 6553, provides: "All taxes shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." If it be held that the said acts of 1919 and 1924 of the Legislature of the State of Georgia permit the City of Decatur, to recover a personal judgment against any of the defendants for the special paving assessment in question, or if it be held that said acts permit plaintiff to make the special paving assessment a personal liability upon any of the defendants sued, that then the said acts and said ordinances or special paving assessment based or made thereunder as thus construed, are void and unconstitutional in that they are in conflict with the said constitutional provisions; for that the said acts and the said municipal ordinances and the said special paving assessment, as thus construed, would permit plaintiff to have a personal liability or judgment against said defendants for the amount of the special paving assessment in violation of the constitutional provision of the State of Georgia and would deny to each of the defendants equality and uniformity of taxation as therein guaranteed, for it is the general rule of law that a special paving assessment cannot be imposed as taxes under said constitutional provision and cannot be made the basis of a personal liability against a property owner. Defendants further say that said acts of 1919 and 1924 are special laws and that the said Georgia Constitutional provisions (as

codified in Georgia Code Section 6553) require taxes to be levied under general laws. Defendants say that the special paving assessment in question, if construed to be a tax [fol. 29] against said defendants, violates said constitutional provisions, for the reason that it is not sought to be levied against said defendants under general laws. Defendants say that if said acts of 1919 and 1924 are construed by the court as permitting a personal liability against any of said defendants for the said special paving assessment in question, that such construction of said acts render said acts and said ordinances based under and by virtue of said acts unconstitutional and violative of Georgia constitutional provisions as set out in Georgia Code Section 6358 and 6359 and are violative of the 14th amendment of the Constitution of the United States, for such construction would deprive said defendants of the equal protection of the law as therein provided; would unconstitutionally discriminate against each of said defendants and would deprive each of said defendants of their property without due process of law.

(25) Defendants say that in construing the laws of the State of Georgia and in holding that special paving assessments do not fall under the class of taxation as referred to in Georgia constitutional provisions codified in Section 6553 it is held that under the laws of the State of Georgia special paving assessments can only be sustained on the basis of benefits accruing to particular property affected thereby and that such special paving assessments are and can be imposed only upon the property benefited, and that execution therefor can not be a personal liability against the property owner and cannot run generally against other property of the property owner but can only run against the particular property affected and benefiited by the improvement.

(26) Defendants show to the court the following state of facts:

Before the passage of any special paving ordinance by the plaintiff, two of the defendants, being separate and distinct corporations, to wit, the Georgia Railway & Electric Company and the Georgia Railway & Power Company, hearing that the municipality of Decatur might pave a portion of Ponce de Leon Avenue along which street railway

tracks were laid and a line was being operated, notified the [fol. 30] plaintiff that the street railway lines in Decatur were being operated at a loss and that the contemplated paving assessment if made against the street railway company or its property would greatly exceed the entire value of the street railway property located along Ponce de Leon Avenue and would entirely exceed the value of the street railway lines located within the municipal limits of Decatur. At said time the Georgia Railway & Power Company was the lessee and the Georgia Railway & Electric Company was the owner of said line and franchise in Decatur, and each of said parties offered to cease operation of its street railway lines in Decatur and surrender to plaintiff the entire street railway lines and property constructed and operated thereunder, together with the franchise under and by virtue of which they were constructed and being operated. That prior to the passage of any ordinance defendants notified the plaintiff that if it constructed paving on Ponce de Leon Avenue and sought to make an assessment against either of said companies or their property that the costs of the same would vastly exceed the entire value of the street railway property located and being operated within the territorial limits of plaintiff taking into consideration all improvements of whatever kind or character might be made by virtue of the street improvement. That in addition to said notification the Georgia Railway & Electric Company, the lessor, and owner of the street railway lines in Decatur, and the Georgia Railway & Power Company the lessee and operator of the street railway lines, by proper corporate action, gave notice to the plaintiff that it would surrender all of its franchise rights therein, but the plaintiff took action to compel further and continued operation of the said street railway lines in Decatur.

Defendants say that the plaintiff passed an ordinance to pave a part of Ponce de Leon Avenue and to make a special paving assessment "against the Georgia Railway & Power Company for the total costs of paving between the tracks of said company and for two feet on each side thereof." That thereafter a fi. fa. was issued against the Georgia Railway & Power Company. No ordinance or assessment was ever [fol. 31] made against the Georgia Railway & Electric Company and no fi. fa. has been issued against said company or any of its property. The street railway lines along Ponce

de Leon Avenue (the street paved) had been constructed by virtue of a franchise granted by the City of Decatur to the Collins Park & Belt Railroad Company. The said franchise and the street railway lines in Decatur became the property of the Georgia Railway & Electric Company and a municipal franchise from the City of Decatur to said Company with reference to said line provided that no higher rate of fare than 5 cents per passenger could be charged on said line during its operation. Defendants show that the amount of the special paving assessment in questio was and is more than the value of the entire street railway lines located and operated within the territorial limits of Decatur, including the franchise under and by virtue of which said line was constructed and being operated. With the street paving and the street paving improvement the street railway lines, within the territorial limits of Decatur and the franchise under which the same were constructed and operated, were and are not worth the amount of the special paving assessment in question and the special paving fi. fa. The street railway line and the franchise under which it is constructed and being operated within the territorial limits of Decatur were and are not worth anything to the balance of the street railway line or system outside of Decatur. The paving, for which the street paving assessment in question was made, did not, does not and cannot benefit the portion of the street railway lines located within the territorial limits of Decatur. The street paving did not add anything to the physical property or franchise of the defendants or any of them. It was a detriment to the physical property and to the portion of the street railway line. The paving did not add anything to traffic. The street railway lines of defendants and the franchise under which it was constructed and operated were not and are not worth the amount of the special paving assessment in question. Defendants make a tender and a continuing tender of the entire street railway lines located within the territorial limits of Decatur, together with the franchise under which [fol. 32] it was constructed and being operated in payment or satisfaction of the special paving assessment in question.

(27) Each of said defendants say that the present suit is an undertaking on the part of the plaintiff to recover the amount of said special paving assessment against the defendants and each of them, although none of the defend-

ants and none of the defendents' property received any benefits from the street improvement or the paving of said street.

(28) Each of said defendants say that the present suit is an undertaking on the part of the plaintiff to recover a personal judgment against each of said defendants under and by virtue of a claimed special paving assessment made under the Acts of the Georgia Legislature of August 12, 1924, (Georgia Laws 1924, page 534 et seq.). Defendants say that said law, if properly construed, does not permit a personal liability or judgment to be issued against said defendants as is attempted in the present suit. Each of said defendants say that under the facts, as just heretofore set out, plaintiff is not entitled to a personal liability or judgment against any of said defendants for said special paving assessment as attempted in said suit. The law of the State of Georgia, as repeatedly announced by the highest court of this State, is that special paving assessments are and must be imposed on property and cannot be made a personal liability or the basis for obtaining a personal judgment against the property owner. Each of said defendants says that said acts of 1924 (Georgia Laws 1924, page 534 et seq.) and the charter amendment provisions of plaintiff, if properly construed, do not create a personal liability against defendants, or any of them, for the special paving assessment in question and does not authorize plaintiff to have a personal judgment rendered against any of said defendants for said special paving assessment as is attempted in the instant suit.

Each of said defendant- say that if this court should so construe the provisions of the acts of 1919 page 934 et seq. and the acts of August 12, 1924 (Georgia Laws 1924, page [fol. 33] 534, et seq.) as creating a personal liability against the defendants or any of them, for the special paving assessment in question, or if this court should construe the ordinances as passed by the plaintiff and the special assessment as made thereunder as authorizing such personal liability for the special paving assessment in question, then the said acts and said ordinances as thus construed are void and unconstitutional in that they are discriminatory against each of said defendants and deny to each of said defendants the equal protection of the law and the due process of law as guaranteed by the Constitution of the

State of Georgia as codified in Georgia Code Sections 6359 and 6359, and as guaranteed in the 14th amendment of the Constitution of the United States.

(29) Defendants say that as heretofore set out there is an entire absence of benefit to said defendants or their property from the paving in question. Defendants further show that the special paving assessment sought to be assessed against each of said defendants unconstitutionally confiscates the property of said defendants, for that the costs of said special paving assessment is substantially in excess of any special benefits which have accrued or can accrue to any of said defendants or any of said defendants' property wherever located, and the special paving assessment in question so far exceeds any benefit of any kind or character which defendants, or defendants' property, can receive from the paving, so as to make said special paving assessment unjust and confiscation of the property of the defendants in violation of the 14th amendment of the Constitution of the United States.

(30) Defendants show that without special benefits special paving assessments (not exacted under general taxation and under general laws as provided for in Georgia constitutional provisions codified in Georgia Code Section 6553) are unconstitutional and cannot be sustained and are likewise unconstitutional and cannot be sustained when the assessment is arbitrary and unreasonable in amount or the amount of the assessment exceeds the benefits. That in such cases said special paving assessments are violative of the 14th amendment of the Constitution of the United States. [fol. 34] Each of said defendants separately allege that in the instant case the amount of the special paving assessment in question is excessive and unreasonable and arbitrary in amount; that it exceeds the special benefits received by any of the defendants or any of the defendants' property, and defendants' property receives no special benefit from the paving improvement.

(31) Defendants say that if under the facts set out in this answer the court construes the provisions of the act of 1919, page 934, et seq. and the provisions of the act of 1924, approved August 12, 1924, page 534, et seq. and construe the special assessment ordinance in question as permitting the collection of the special paving assessment

against the defendant-, or any of them, and as permitting a personal judgment against the defendants, or any of them, that then said acts and said ordinances and each of them, as thus construed, are unconstitutional and void in violation of the equal protection of the law and the due process of law as guaranteed under the 14th amendment of the Constitution of the United States and that if such construction is placed upon said acts and said ordinances that said acts and said ordinances confiscate the property of the defendants and each of them, and is unreasonably discriminatory against each of them in contravention of the 14th amendment of the Constitution of the United States and deprives each of said defendants of the due process of law as therein guaranteed, for the following additional reasons:

(a) For that said acts and said ordinances thus construed would place a special paving assessment, as a personal liability, upon all the property, whether real or personal of each of said defendants, and upon all the property of each of said defendants wherever located or situated whether within or without the municipal limits of the City of Decatur. Whereas all other paving assessments under said acts and said ordinances are limited not only to real property within the municipal limits of Decatur, but to real property lying along or adjacent to the street being improved and paved.

(b) Said acts and said ordinances as thus construed would subject each of the defendants to a personal liability [fol. 35] for a special paving assessment and would authorize a general judgment against each of said defendants thus creating a lien upon all the property of each of said defendants and all the property of the Georgia Railway & Electric Company and all the property of the Georgia Railway & Power Company, both real and personal located anywhere within the municipal limits of Decatur, without regard as to whether said property is situated in a area or along the street being paved or improved; whereas all other paving assessments are limited to the property within the area being improved and adjacent to or along the street being paved. The same is also true to all property, both real and personal, of the Georgia Power Company.

(c) Said acts and ordinances as thus construed would authorize a general personal judgment and place a special paving assessment upon all the property of each of said

defendants whether real or personal not only located anywhere within the municipal limits of the City of Decatur, but located anywhere without said limits and without regard to whether said property is situated in the area or along the street being paved or improved or whether said property was or could in any way be benefited by said improvement, whereas all other paving assessments do not permit a personal judgment of any kind or character but is limited not only to real property within the limits of the municipality of Decatur but to real property benefited and to real property adjacent to or along the street being paved or improved.

(d) Said acts and said ordinances as thus construed would place a paving assessment against all of the street railway property of each of said defendants whether real or personal, situated and located anywhere within or without the limits of Decatur without regard to benefits; whereas the paving assessment against all other property is solely against real property benefited and located within the area being improved and adjacent to the street being paved or improved.

(e) Said acts and said ordinances as thus construed would place a special paving assessment and allow the plaintiff to have a lien upon all street railway property of the defendants located anywhere within the municipal [fol. 36] limits of Decatur without regard to any special benefit received by defendants or any of them to their property located within the municipal limits of Decatur; whereas the special paving assessment and lien against all other property are limited to special benefits received by such real property within the area being improved and to such real property as lies along and adjacent to the street being improved.

(f) Said acts and said ordinances as thus construed would not limit the special paving assessment and lien against the defendants, or any of them, to benefits received either to defendants real or personal property located within the municipal limits of Decatur; whereas the special paving assessment and lien against all other property are limited to special benefits to real estate located within the municipal limits of Decatur, and within the

limits of the area being improved and adjacent to and along the street being paved or improved.

(g) Said acts and said ordinances thus construed would not limit the special paving assessment in question to benefits or to the amount of benefits received by the street railway property, real or personal, located within or without the territorial limits of the municipal- of Decatur; whereas the special paving assessments against all other property owners is limited to benefits received by real property within the municipal limits of Decatur and within the area being improved and adjacent to and located upon the street being paved or improved:

(h) Said acts and said ordinances as thus construed would confiscate the property of defendants and each of them, for that under the facts in the instant case the special paving assessment would not be limited to benefits or to amount of benefits received by defendants, or any of them. Each of the defendants allege that its property and the property of the other defendants receive no benefits from the special paving assessment in question; and further allege that neither of said defendants nor defendants' property receive any benefits from the special paving assessment in question equal to or commensurate with the special paving assessment, and this is irrespective of whether the [fol. 37] question of benefits be confined to the limits of Decatur or to the defendants or to the property of any of the defendants located outside of said territorial limits of Decatur.

Defendants allege that the property of the Street Railway Company, whether rear or personal, within the limits of Decatur, receive no benefits from the street paving improvement and further allege that none of said companies, nor the property of said companies, within the limits of Decatur receive a benefit to or commensurate with the amount of said assessment.

Defendants say that none of the defendants nor their property within the area improved received any benefits from the street paving and further allege that the said property did not receive any benefits equal to or commensurate with the amount equal to said paving assessment.

Each of said defendants further allege that the special paving assessment uncontitutionally confiscates the property of each of said defendants, for the reason that the amount of said special paving assessment greatly exceeds any benefits received or that can be received by the defendants or any of them, and that the amount of said special paving assessment is so disproportioned to the benefits which defendants or any of them did or could receive from said street improvement that the said special paying assessment amounts to an unconstitutional confiscation of the property of each of said defendants.

(i) Defendants say that if said acts and said ordinances are construed by the Court as sustaining the special paving assessment in question and as establishing benefits and as depriving the defendants of the right to show that the property of defendants have received no benefits from the improvements equal or commensurate with the amount of the assessment then said acts and assessment ordinances as thus construed, deprive each of said defendants of due process of law in that it denies to each of said defendants a hearing with reference to benefits, as compared to the special paving assessment in question. Each of said defendants claim that under the facts said assessment so far [fol. 38] exceeds any special benefits as to render said assessment unreasonable and confiscatory.

Colquitt, Parker, Troutman & Arkwright, Attorneys for Defendants.

[File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

AMENDED PLEA AND ANSWER—Filed June 20, 1933

And now comes Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company, and by leave of court first had and obtained, each of said corporations files the following amended plea and answer as a separate amended plea and answer, in the above-named suit.

1. Defendants, and each of them separately say that if the statutory method as set out in the charter of petitioner is held to be constitutional and does not violate the various constitutional provisions as set out and insisted upon in its plea and answer heretofore filed, that then said statutory method as set out in petitioner's charter is exclusive and that neither a court of equity nor a court of law can enlarge or extend the method as provided for in the legislative acts giving charter power- to petitioner, for that the said legislative act and charter powers with reference to the making of special paving assessments and with reference to the method and manner of their collection are exhaustive of petitioner's rights and remedies.

2. Defendants, and each of them separately, say that the constitution of the State of Georgia, Code Section 6379 provides:

[fol. 39] "The legislative, judicial, and executive powers shall forever remain separate and distinct, and no person discharging the duties of one shall at the same time exercise the functions of either of the others, except as herein provided."

There is no exception to said constitutional provision in the Constitution of the State of Georgia or in any legislative act of the State of Georgia authorizing a court of law or a court of equity to levy or to assess or to collect the special paving assessment in question. There is no statutory provision authorizing petitioner to collect the paving assessment in question in any other method or manner than that specifically set out and provided for in the legislative acts creating petitioner and the various legislative acts amending petitioner's charter, and there is no statutory act giving petitioner any right, power or authority to collect the special paving assessment in question by either a suit at law or suit in equity. Under said constitutional provision legislative power is not conferred upon the judiciary and the judiciary is prohibited from exercising legislative power while sitting either as a court of law or as a court of equity.

Neither a court of law nor a court of equity has any right, power or authority to provide for special paving assessment or taxes or to provide for special assessments or for the manner and method of collecting special assess-

ments or taxes other than in the method and manner as enacted by the legislature of the State of Georgia. No such legislative power or authority has been conferred by any legislative act upon either a court of law or a court of equity, and neither of said courts can legislate a remedy either for the assessment or collection of the paving assessment in question other than that provided for by the legislature of the State of Georgia. That under and by virtue of the Constitution of the State of Georgia, Code Section 6379, neither a court of law nor a court of equity can supply any additional remedy for the assessment or method and manner of collection of the paving assessment in question other than that provided for by the legislature of the State of Georgia.

[fol. 40] 3. Defendants, and each of them separately, say that the only assessment made in the case at bar was a special paving assessment against the Georgia Railway & Power Company. No special paving assessment was made either against the Georgia Railway and Electric Company or the property of the Georgia Railway & Electric Company, or against the Georgia Power Company or the property of the Georgia Power Company. No special paving assessment was made against any claimed lease-hold interest of the Georgia Railway & Power Company and no court of law or equity has any power or authority to make any special paving assessment for that no such power or authority has been conferred upon either of said courts by the legislature of the State of Georgia.

4. Defendants, and each of them separately, say that if the suit at bar be construed as a suit having for its purpose the collection of a special paving assessment and obtaining a general judgment against each or all of the defendants sued, that then said suit is barred by the Statute of Limitations as to each of said defendants, and each of said defendants separately plead the Statute of Limitations.

Defendants, and each of them separately, say that the suit in question is not a suit seeking to enforce any lien against any property or any specific property and is not a suit to reach any trust funds, but is merely an undertaking on the part of petitioner to collect a certain amount of money from each of said defendants. That the claimed amount for which a judgment is sought against each of

said defendants is not evidenced by any contract in writing or founded upon any contract in writing. That under and by virtue of Code Section 4362 of the State of Georgia all actions upon open account or for a breach of any contract not under the hand of the party sought to be charged or upon any implied assumpsit or undertaking, shall be brought within four years after the right of action accrues. That, Section 4368 provides that all other actions upon contracts expressed or implied, not hereinbefore provided for must be brought within four years of the accrual of the right of action.

Each of said defendants say that under the statutory [fol. 41] law of the State of Georgia the cause of action sought to be set out against it is barred by said statutory enactments and is barred by the statute of limitations of the State of Georgia applicable to the cause of action as sought to be set out against each of the defendants sued.

Georgia Code Section 4372 provides:

"Any claim or demand held by any municipality, not being in the shape of a special contract, or which has not been reduced to execution, shall be barred by the statutes of limitation as provided by the general statutes of limitation of force in this State, and all executions issued by any municipality shall be subject to the same laws as to the statute of limitation now governing other executions."

Each of the defendants say that if the suit in question is held to be a claim or demand held by the municipality and not in the shape of a special contract that then, construing said action as undertaking to recover a money demand against the defendants, (and if such action can be maintained, which defendants deny) the action is barred by the statutes of limitation. Each of the defendants say that however said cause of action may be construed, that in so far as it undertakes to recover a mere money demand or judgment against the defendants, or any of them, that the same is barred by the statutes of limitation.

Colquitt, Parker, Troutman & Arkwright, Attorneys for Defendants.

STATE OF GEORGIA,
Fulton County:

Personally appeared before the undersigned, P. S. Arkwright, who on oath says that he is president of the Georgia

Power Company, and says that at the time of filing the original plea and answer in the instant case the facts or defenses herein set out were not omitted for the purpose of delay and that this amendment is not now offered for delay.

P. S. Arkwright.

Sworn to and subscribed before me this 19th day of June, 1933. Ruby Bowden, Notary Public, [fol. 42] Georgia, State at Large. My commission expires March 1, 1937. (Seal of N. P.)

[File endorsement omitted.]

Allowed and ordered filed as part of the record in said case—subject to demurrer.

This June 20th, 1933.

G. H. Howard, Judge S. C. A. C.

In Superior Court of Fulton County

[Title omitted]

Motion to Dismiss the Petition—Filed March 31, 1933

And now comes the Georgia Railway & Electric Company, one of the defendants in the above-stated case, and moves to dismiss the petition filed in said case and demurs to the petition filed in said case, upon the following grounds:

1. Said petition does not set out sufficient facts to entitle the plaintiff to the relief sought against this defendant.

2. Under the rules and principles of law the plaintiff is not entitled to the relief sought in the case at bar.

3. Under the facts and the principles of law governing special paving assessments petitioner is not entitled to a personal judgment against this defendant or to make this defendant personally liable for the paving assessment in question and is not entitled to have a general judgment rendered against this defendant for the special paving assessment in question.

4. Defendant says there is no statute or charter provision of the City of Decatur authorizing petitioner to make this

defendant personally liable for the paving assessment in question.

[fol. 43] 5. Defendant says that there are no statutes or charter powers of the City of Decatur giving the City the right to maintain said suit against this defendant or giving petitioner the right to recover a personal judgment against this defendant on account of any special paving assessment.

6. Movant and defendant says that if any of the statutes of the State of Georgia or any of the charter provisions of the City of Decatur be held as giving petitioner the right to impose a personal liability upon this defendant for and by virtue of any special paving assessment sought to be made against this defendant, then movant says that such statute or such charter provision, as thus construed, would be unconstitutional and violative of Article 7, section 2, paragraph 1, (Code Section 6553) of the State of Georgia, for that said Code Section provides that all taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed • • • and shall be levied under general laws. Defendant says that to impose a personal liability upon this defendant for the cost of special paving improvements would violate said constitutional provisions for equality and uniformity of taxation as provided for in said constitutional provision.

7. Movant and defendant says that under the law of the State of Georgia special paving assessments are imposed on property and that paving assessments for paving of streets have been sustained by the Supreme Court of this State only because of benefit to particular property and that under such construction of the law of this State with reference to paving assessments, executions issued therefor do not run generally against the owner of the property, and that the instant suit is not authorized for it would be in contravention of the rules of law governing special paving assessments, and to allow a personal general judgment against this defendant, under the facts set out in this case, would be to abandon the theory of specific benefits which is the only basis upon which special paving assessments can be made under the laws of this State.

[fol. 44] 8. Defendant says that there is no law of the State of Georgia entitling plaintiff to collect the special paving assessment fi. fa. in question by a suit in equity

undertaking to obtain a general personal judgment against this defendant.

9. Defendant says that if by the proceedings in the present case seeking to enforce the fi. fa. in question, the plaintiff is claiming to act under and by virtue of the Acts of the Legislature of the State of Georgia, Acts 1919, page 834, et seq., and the Acts of the Legislature of the State of Georgia, approved August 12, 1924, Georgia Laws 1924, page 534, (the same being amendments to the charter of the plaintiff) then defendant says that said act, and amendments does not give the plaintiff the right to collect said fi. fa. or to obtain a personal judgment against this defendant.

Defendant further says that if said act be so construed as to permit a personal liability or personal judgment to be recovered against this defendant that then said act, as thus construed, would be illegal, void and unconstitutional and violative of the Constitution of the State of Georgia, Article 7, Section 2, Paragraph 1, Codified in Georgia Code Section 6553; for that the said act, as thus construed will permit plaintiff to recover a personal judgment against this defendant for a special paving assessment and will permit plaintiff to make a special paving assessment a personal liability upon this defendant, and in so construing said act or acts would be in contravention and in conflict with the said provision of the Georgia Constitution and that such construction of said act would further be unconstitutional and violative of the Constitution of the State of Georgia and the Federal Constitution in that said act as thus construed, would deny to this defendant the right to equality and uniformity of taxation not only as guaranteed to this defendant by the said Georgia Constitution (Code Section 6553) but would also be in contravention of the equal protection of the law guaranteed to this defendant by the 14th amendment to the Constitution of the United States, for that special paving assessments under the laws of the State [fol. 45] of Georgia cannot be made a personal liability upon the owner of the property benefited and to permit such special pavement assessment to be made a personal liability against this defendant would deprive this defendant of the equal protection of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

10. Defendant says that if said Acts of 1919 and 1924 are construed by the court as permitting a recovery of a per-

sonal liability against this defendant for the special paving assessment in question, then such construction of sajd acts would render said acts and the ordinance passed thereunder, unconstitutional and violative of the Georgia constitutional provisions as set out in the Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that said construction would deprive said defendant of the equal protection of the law as therein provided and would unconstitutionally discriminate against this defendant and would deprive this defendant of its property without due process of law in violation of the said 14th amendment to the Constitution of the United States.

Movant says that if any statute or act of the State of Georgia be construed as permitting petitioner to obtain a personal judgment against this defendant or to hold this defendant personally liable for the special paving assessment in question then that such Legislative Act or Acts as thus construed would render said acts illegal, void and unconstitutional as violative of Article 7, Section 2, Paragraph 1 (Code Section 6553 of the State of Georgia), and said acts, as thus construed, would further be unconstitutional in that they would violate the Georgia constitutional provisions as set out in Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that such construction would deprive this defendant of the equal protection of the law as therein guaranteed and provided for that the law of this State, as construed by the Supreme Court of the State, is that there is no personal liability for special paving as- [fol. 46] sessments, and to subject this defendant to a personal liability and a personal judgment for a special paving assessment would deprive this defendant of the equal protection of law as guaranteed to it by said State constitutional provisions and would also deprive this defendant of its property without due process of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

Wherefore defendant prays that the petition be dismissed.

Colquitt, Parker, Troutman & Arkwright, Attorneys for Defendant.

Copy of the within and foregoing demurrer and motion to dismiss received. Service acknowledged, and all other and further service hereby waived.

This 28 day of March, 1933.

Branch & Howard, Attys. for Plaintiff.

[File endorsement omitted]

After argument the within motion is hereby overruled. This March 31, 1933.

E. D. Thomas, Judge S. C. A. C.

[fol. 47] In Superior Court of Fulton County

[Title omitted]

Motion to Dismiss the Petition—Filed March 31, 1933

And now comes the Georgia Power Company, one of the defendants in the above-stated case, and moves to dismiss the petition filed in said case and demurs to the petition filed in said case upon the following grounds:

1. Said petition does not set out sufficient facts to entitle the plaintiff to the relief sought against this defendant.

2. Under the rules and principles of law the plaintiff is not entitled to the relief sought in the case at bar.

3. Under the facts and the principles of law governing special paving assessments petitioner is not entitled to a personal judgment against this defendant or to make this defendant personally liable for the paving assessment in question and is not entitled to have a general judgment rendered against this defendant for the special paving assessments in question.

4. Defendant says there is no statute or charter provision of the City of Decatur authorizing petitioner to make this defendant personally liable for the paving assessment in question.

5. Defendant says that there are no statutes or charter powers of the City of Decatur giving the City the right to maintain said suit against this defendant or giving peti-

tioner the right to recover a personal judgment against this defendant on account of any special paving assessment.

6. Movant and defendant says that if any of the statutes of the State of Georgia or any of the charter provisions of the City of Decatur be held as giving petitioner the right to impose a personal liability upon this defendant for and by virtue of any special paving assessment sought to be [fol. 48] made against this defendant, then movant says that such statute or such charter provision, as thus construed, would be unconstitutional and violative of Article 7, Section 2, Paragraph 1, Code Section 6553 of the State of Georgia, for that said Code Section provides that all taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed * * * and shall be levied under general laws. Defendant says that to impose a personal liability upon this defendant for the cost of special paving improvements would violate said constitutional provision for equality and uniformity of taxation as provided for in said constitutional provision.

7. Movant and defendant says that under the law of the State of Georgia special paving assessments are imposed on property and that paving assessments for paving of streets have been sustained by the Supreme Court of this State, only because of benefit to particular property and that under such construction of the law of this State with reference to paving assessment, executions issued therefor do not run generally against the owner of the property, and that the instant suit is not authorized for it would be in contravention of the rules of law governing special paving assessments, and to allow a personal general judgment against this defendant, under the facts set out in this case, would be to abandon the theory of specific benefits which is the only basis upon which special paving assessments can be made under the laws of this State.

8. Defendant says that there is no law of the State of Georgia entitling plaintiff to collect the special paving assessment fi. fa. in question by a suit in equity undertaking to obtain a general personal judgment against this defendant.

9. Defendant says that if by the proceedings in the present case seeking to enforce the fi. fa. in question, the plaintiff is claiming to act under and by virtue of the Acts

of the Legislature of the State of Georgia, Acts 1919, page 834, et seq., and the Acts of the Legislature of the State of Georgia, approved August 12, 1924, Georgia Laws 1924, [fol. 49] page 534 (the same being amendments to the charter of the plaintiff), then defendant says that said act and amendments does not give the plaintiff the right to collect said fi. fa. or to obtain a personal judgment against this defendant.

Defendant further says that if said act be so construed as to permit a personal liability or personal judgment to be recovered against this defendant that then said act, as thus construed, would be illegal, void and unconstitutional and violative of the Constitution of the State of Georgia, Article 7, Section 2, Paragraph 1, codified in Georgia Code Section 6553, for that the said act, as thus construed, will permit plaintiff to recover a personal judgment against this defendant for a special paving assessment, and will permit plaintiff to make a special paving assessment a personal liability upon this defendant, and in so construing said act or acts would be in contravention and in conflict with the said provision of the Georgia Constitution and that such construction of said act would further be unconstitutional and violative of the Constitution of the State of Georgia and the Federal Constitution in that said act would deny to this defendant the right to equality and uniformity of taxation not only as guaranteed to this defendant by the said Georgia Constitution (Code Section 6553) but would also be in contravention of the equal protection of law guaranteed to this defendant by the 14th amendment to the Constitution of the United States, for that special paving assessments under the laws of the State of Georgia cannot be made a personal liability upon the owner of the property benefited and to permit such special paving assessment to be made a personal liability against this defendant would deprive this defendant of the equal protection of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

10. Defendant says that if said act of 1919 and 1924 are construed by the court as permitting a recovery of a personal liability against this defendant for the special paving assessment in question, then such construction of said acts would render said acts and the ordinance passed thereunder, unconstitutional and violative of the Georgia consti-

[fol. 50] tutional provisions as set out in the Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that said construction would deprive said defendant of the equal protection of the law as therein provided and would unconstitutionally discriminate against this defendant and would deprive this defendant of its property without due process of law in violation of the said 14th amendment to the Constitution of the United States.

Movant says that if any statute or act of the State of Georgia be construed as permitting petitioner to obtain a personal judgment against this defendant or to hold this defendant personally liable for the special paving assessment in question, then that such legislative act or acts as thus construed would render said acts illegal, void and unconstitutional as violative of Article 7, Section 2 and Paragraph 1 (Code Section 6553 of the State of Georgia) and said acts, as thus construed, would further be unconstitutional in that they would violate the Georgia Constitutional provisions as set out in Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that such construction would deprive this defendant of the equal protection of the law as therein guaranteed and provided for that the law of this State as construed by the Supreme Court of the State, is that there is no personal liability for special paving assessments, and to subject this defendant to a personal liability and a personal judgment for a special paving assessment would deprive this defendant of the equal protection of law as guaranteed to it by said State constitutional provisions and would also deprive this defendant of its property without due process of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

Wherefore, defendant prays that said petition be dismissed.

Colquitt, Parker, Troutman & Arkwright, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 51] After argument the within motion is hereby overruled. This March 31, 1933.

E. D. Thomas, Judge S. C. A. C.

IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

MOTION TO DISMISS THE PETITION—Filed March 31, 1933

And now comes the Georgia Railway & Power Company one of the defendants in the above-stated case, and moves to dismiss the petition filed in said case and demurs to the petition filed in said case upon the following grounds:

1. Said petition does not set out sufficient facts to entitle the plaintiff to the relief sought against this defendant.

2. Under the rules and principles of law the plaintiff is not entitled to the relief sought in the case at bar.

3. Under the facts and the principles of law governing special paving assessments petitioner is not entitled to a personal judgment against this defendant or to make this defendant personally liable for the paving assessment in question and is not entitled to have a general judgment rendered against this defendant for the special paving assessment in question.

4. Defendant says there is no statute or charter provision of the City of Decatur authorizing petitioner to make this defendant personally liable for the paving assessment in question.

5. Defendant says that there are no statutes or charter powers of the City of Decatur giving the City the right to maintain said suit against this defendant of giving the petitioner the right to recover a personal judgment against this defendant on account of any special paving assessment.

[fol. 52] 6. Movant and defendant says that if any of the statutes of the State of Georgia or any of the charter provisions of the City of Decatur be held as giving petitioner the right to impose a personal liability upon this defendant for and by virtue of any special paving assessment sought to be made against this defendant, then movant says that such statute or such charter provision, as thus construed,

would be unconstitutional and violative of Article 7, Section 2, Paragraph 1, of Code Section 6553 of the State of Georgia, for that said Code Section provides that all taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed • • • and shall be levied under general laws. Defendant says that to impose a personal liability upon this defendant for the cost of special paving improvements would violate said constitutional provision for equality and uniformity of taxation as provided for in said constitutional provision.

7. Movant and defendant says that under the law of the State of Georgia special paving assessments are imposed on property and that paving assessments for paving of streets have been sustained by the Supreme Court of this State only because of benefit to particular property and that under such construction of the law of this State with reference to paving assessment, executions issued therefor do not run generally against the owner of the property, and that the instant suit is not authorized for it would be in contravention of the rules of law governing special paving assessments, and to allow a personal general judgment against this defendant, under the facts set out in this case, would be to abandon the theory of specific benefits which is the only basis upon which special paving assessments can be made under the laws of this State.

8. Defendant says that there is no law of the State of Georgia entitling plaintiff to collect the special paving assessment fi. fa. in question by a suit in equity undertaking to obtain a general personal judgment against this defendant.

[fol. 53] 9. Defendant says that if by the proceedings in the present case seeking to enforce the fi. fa. in question, the plaintiff is claiming to act under and by virtue of the Acts of the Legislature of the State of Georgia, Acts 1919, page 834, et seq., and the Acts of the Legislature of the State of Georgia, approved August 12, 1924, Georgia Laws 1924, page 534, (the same being amendments to the charter of the plaintiff) then defendant says that said act and amendments does not give the plaintiff the right to collect said fi. fa. or to obtain a personal judgment against this defendant.

Defendant further says that if said act be so construed as to permit a personal liability or personal judgment to be

recovered against this defendant that then said act, as thus construed, would be illegal, void and unconstitutional and violative of the Constitution of the State of Georgia, Article 7, Section 2, Paragraph 1, Codified in Georgia Code Section 6553, for that the said act, as thus construed, will permit plaintiff to recover a personal judgment against this defendant for a special paving assessment and will permit plaintiff to make a special paving assessment a personal liability upon this defendant, and in so construing said act or acts would be in contravention and in conflict with the said provision of the Georgia Constitution and that such construction of said act would further be unconstitutional and violative of the Constitution of the State of Georgia and the Federal Constitution in that said act, as thus construed, would deny to this defendant the right to equality and uniformity of taxation not only as guaranteed to this defendant by the said Georgia Constitution (Code Section 6553) but would also be in contravention of the equal protection of law guaranteed to this defendant by the 14th amendment to the Constitution of the United States, for that special paving assessments under the laws of the State of Georgia cannot be made a personal liability upon the owner of the property benefited and to permit such special paving assessment to be made a personal liability against this defendant would deprive this defendant of the equal protection of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

[fol. 54] 10. Defendant says that if said acts of 1919 and 1924 are construed by the court as permitting a recovery of a personal liability against this defendant for the special paving assessment in question, then such construction of said acts would render said acts and the ordinance passed thereunder, unconstitutional and violative of the Georgia constitutional provisions as set out in the Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that said construction would deprive said defendant of the equal protection of the law as therein provided and would unconstitutionally discriminate against this defendant and would deprive this defendant of its property without due process of law in violation of the said 14th amendment to the Constitution of the United States.

Movant says that if any statute or act of the State of Georgia be construed as permitting petitioner to obtain a personal judgment against this defendant or to hold this defendant personally liable for the special paving assessment in question, then that such legislative act or acts as thus construed would render said acts illegal, void and unconstitutional as violative of Article 7, Section 2, and Paragraph 1, (Code Section 6553 of the State of Georgia), and said acts, as thus construed, would further be unconstitutional in that they would violate the Georgia constitutional provisions as set out in Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that such construction would deprive this defendant of the equal protection of the law as therein guaranteed and provided for that the law of this State, as construed by the Supreme Court of the State, is that there is no personal liability for special paving assessments, and to subject this defendant to a personal liability and a personal judgment for a special paving assessment would deprive this defendant of the equal protection of law as guaranteed to it by said State constitutional provisions and would also deprive this defendant of its property without the process of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

[fol. 55] Wherefore, defendant prays that this petition be dismissed.

Colquitt, Parker, Troutman & Arkwright, Attorneys for Defendant.

[File endorsement omitted.]

After argument the within motion is hereby overruled. This March 31, 1933.

E. D. Thomas, Judge S. C. A. C.

IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

BILL OF EXCEPTIONS PENDENTE LITE—Filed April 10, 1933

STATE OF GEORGIA,
Fulton County:

Be it remembered that on the 31st day of March 1933, before the Honorable E. D. Thomas, Judge of the Superior Court, of Fulton County presiding, there came on to be heard the case of City of Decatur vs. Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company, the same being an action to recover a judgment against each one of the said named defendants to collect a certain special paving assessment.

The Georgia Railway & Electric Company, one of the defendants in the above-stated case, moved to dismiss the petition filed in said case upon the following grounds:

1. Said petition does not set out sufficient facts to entitle the plaintiff to the relief sought against this defendant.

2. Under the rules and principles of law the plaintiff is not entitled to the relief sought in the case at bar.

3. Under the facts and the principles of law governing special paving assessments petitioner is not entitled to a [fol. 56] personal judgment against this defendant or to make this defendant personally liable for the paving assessment in question and is not entitled to have a general judgment rendered against this defendant for the special paving assessment in question.

4. Defendant says there is no statute or charter provision of the City of Decatur authorizing petitioner to make this defendant personally liable for the paving assessment in question.

5. Defendant says that there are no statutes or charter powers of the City of Decatur giving the City the right to maintain said suit against this defendant or giving petitioner the right to recover a personal judgment against this defendant on account of any special paving assessment.

6. Movant and defendant says that if any of the statutes of the State of Georgia or any of the charter provisions of

the City of Decatur be held as giving petitioner the right to impose a personal liability upon this defendant for and by virtue of any special paving assessment sought to be made against this defendant, then movant says that such statute or such charter provision, as thus construed, would be unconstitutional and violative of Article 7, Section 2, Paragraph 1, Code Section 6553 of the State of Georgia, for that said Code Section provides that all taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed * * * and shall be levied under general laws. Defendant says that to impose a personal liability upon this defendant for the cost of special paving improvements would violate said constitutional provisions for equality and uniformity of taxation as provided for in said constitutional provision.

7. Movant and defendant says that under the law of the State of Georgia special paving assessments are imposed on property and that paving assessments for paving of streets have been sustained by the Supreme Court of this State only because of benefit to particular property and that under such construction of the law of this State with reference to paving assessment, executions issued therefor do not run generally against the owner of the property, and [fol. 57] that the instant suit is not authorized for it would be in contravention of the rules of law governing special paving assessment, and to allow a personal general judgment against this defendant, under the facts set out in this case would be to abandon the theory of specific benefits which is the only basis upon which special paving assessments can be made under the laws of this State.

8. Defendant says that there is no law of the State of Georgia entitling plaintiff to collect the special paving assessment fi. fa. in question by a suit in equity undertaking to obtain a general personal judgment against this defendant.

9. Defendant says that if by the proceedings in the present case seeking to enforce the fi. fa. in question, the plaintiff is claiming to act under and by virtue of the acts of the Legislature of the State of Georgia, Acts 1919, page 834, et seq. and the acts of the Legislature of the State of Georgia approved August 12, 1924, Georgia Laws, 1924, page 534 (the same being amendments to the charter of the plaintiff) then defendant says that said act and amend-

ments does not give the plaintiff the right to collect said fi. fa. by suit or to obtain a personal judgment against this defendant.

Defendant further says that if said act be so construed as to permit a personal liability or personal judgment to be recovered against this defendant that then said act, as thus construed, would be illegal, void and unconstitutional and violative of the Constitution of the State of Georgia, Article 7, Section 2, Paragraph 1, Codified in Georgia Code Section 6553 for that the said act, as thus construed, will permit plaintiff to recover a personal judgment against this defendant for a special paving assessment and will permit plaintiff to make a special paving assessment a personal liability upon this defendant, and in so construing said act or acts would be in contravention and in conflict with the said provision of the Georgia Constitution and that such construction of said act would further be unconstitutional and violative of the Constitution of the State of Georgia and the [fol. 58] Federal Constitution in that said act as thus construed, would deny to this defendant the right to equality and uniformity of taxation not only as guaranteed to this defendant by the said Georgia Constitution (Code Section 6553) but would also be in contravention of the equal protection of law guaranteed to this defendant by the 14th amendment to the Constitution of the United States, for that special paving assessments under the laws of the State of Georgia cannot be made a personal liability upon the owner of the property benefited and to permit such special paving assessment to be made a personal liability against this defendant would deprive this defendant of the equal protection of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

10. Defendant says that if said act of 1919 and 1924 are construed by the court as permitting a recovery of a personal judgment or liability against this defendant for the special paving assessment in question, then such construction of said acts would render said acts and the ordinance passed thereunder unconstitutional and violative of the Georgia constitutional provisions as set out in the Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that said construction would deprive said defendant of the equal protection of the law as therein provided and

would unconstitutionally discriminate against this defendant and would deprive this defendant of its property without due process of law in violation of the said 14th amendment to the Constitution of the United States.

Movant says that if any statute or acts of the State of Georgia be construed as permitting petitioner to obtain a personal judgment against this defendant or to hold this defendant personally liable for the special paving assessment in question then that such Legislative act or acts as thus construed would render said acts illegal, void and unconstitutional as violative of Article 7, Section and Paragraph 1 (Code Section 6553 of the State of Georgia) and said acts as thus construed, would further be unconstitutional in that they would violate the Georgia constitutional provisions as set out in Georgia Code Sections 6358 and 6359, and [fol. 59] would also violate the 14th amendment to the constitution of the United States for that such construction would deprive this defendant of the equal protection of the law as therein guaranteed and provided; for that the law of this State, as construed by the Supreme Court of the States, is that there is no personal liability for special paving assessments, and to subject this defendant to a personal liability and a personal judgment for a special paving assessment would deprive this defendant of the equal protection of law as guaranteed to it by said State constitutional provisions and would also deprive this defendant of its property without due process of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

11. Defendant further moved to dismiss said suit upon the ground that the petition in said case does not allege or claim that defendant received any benefit from the paving assessment in question, and that the paving assessment sought to be enforced against this defendant is not based or predicated upon any claim of benefits, there being no allegation or contention of benefits, and the said paving assessment not being based or predicated upon any claim of benefits and said suit not claiming or alleging any benefits to defendant, defendant moved to dismiss said suit upon the ground that the paving assessment and the ordinance in question are illegal, invalid and unconstitutional and violative of the 14th amendment to the Constitution of the United States, for that said assessment and said paving

ordinance, there being no contention or allegation with reference to benefits, confiscates the property of the defendant and denies it the due process of law and the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States.

Defendant further moved to dismiss said petition for the reason that all other paving assessments, under the ordinance in question, and under the laws of the State of Georgia, are based upon claimed benefits and the foundation of such assessment is predicated upon benefits, and that to base such paving assessment against other prop-
[fol. 60] erty upon the claim of benefits and to base said paving assessment against this defendant without any claim of benefits, and not upon any contention or claim of benefits, would deny to defendant the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States, and for this reason would render said assessment illegal, invalid and unconstitutional.

Defendant further says that under the laws of the State of Georgia all other special paving assessments made against other property is not a personal liability against the owner of such other property and can only be enforced against the property benefited and that to construe the charter amendment of the City of Decatur, heretofore set out, as holding that no personal liability can be rendered against the owners of such other property, but to hold that a personal liability can be enforced against this defendant would render said statute, as thus construed, unconstitutional for that it would deprive this defendant of the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States, for the said statute, as thus construed, would render an entirely different remedy against this defendant for the collection of a special paving assessment than is allowed against all other property owners.

The court passed an order upon said motion of this defendant and overruled each and every ground of said motion. The said order as rendered by the court being as follows:

"After argument the within motion is hereby overruled. This March 31, 1933. E. D. Thomas, Judge S. C. A. C."

To said ruling of the court the defendant Georgia Railway & Electric Company, then excepted and now excepts

and says that the court erred in not sustaining each and every one of the grounds of its motion to dismiss said petition, and says that the court erred in overruling each and every one of its said grounds of its said motion to dismiss said petition, and the Georgia Railway & Electric Company then excepted and now excepts to the said ruling of said court and then and now excepts and says that the court erred in its said holding and erred in overruling each and [fol. 61] every one of said grounds of its said motion and erred in not sustaining each and every one of said grounds of its said motion and defendant, Georgia Railway & Electric Company, assigns error upon the said ruling of the court and says that the court erred in not sustaining each and every one of the contentions of the defendant, George Railway & Electric Company, as made in said motion, and erred in not dismissing said petition.

And now comes the Georgia Railway & Electric Company, within the time allowed by law and files this its bill of exceptions pendente lite and prays that this its bill of exceptions pendente lite be certified to be true and ordered placed on the minutes and filed as a part of the record in said case.

Colquitt, Parker, Troutman & Arkwright, Attorneys for Georgia Railway & Electric Company.

[File endorsement omitted.]

Certificate

The foregoing bill of exceptions pendente lite are hereby approved and certified to be true and to have been tendered within the time allowed by law for the filing of bill of exceptions pendente lite and the bill of exceptions pendente lite are allowed and certified to be true within 30 days from the passage of the order complained of and within the time for the tendering and certification of bill of exceptions pendente lite.

Let the said bill of exceptions pendente lite, together with this certificate, be filed as part of the record in said case and placed upon the records and minutes of the superior court of Fulton County.

This 10 day of April, 1933.

E. D. Thomas, Judge S. C. A. C.

[fol. 62] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

BILL OF EXCEPTIONS PENDENTE LITE—Filed April 10, 1933

STATE OF GEORGIA,
Fulton County:

Be it remembered that on the 31st day of March 1933, before the Honorable E. D. Thomas, Judge of the Superior Court of Fulton County, presiding, there came on to be heard the case of City of Decatur vs. Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company, the same being an action to recover a judgment against each one of the said named defendants to collect certain special paving assessments.

The Georgia Power Company, one of the defendants in the above-stated case, moved to dismiss the petition filed in said case upon the following grounds:

1. Said petition does not set out sufficient facts to entitle the plaintiff to the relief sought against this defendant.

2. Under the rules and principles of law the plaintiff is not entitled to the relief sought in the case at bar.

3. Under the facts and the principles of law governing special paving assessments petitioner is not entitled to a personal judgment against this defendant or to make this defendant personally liable for the paving assessment in question and is not entitled to have a general judgment rendered against this defendant for the special paving assessment in question.

4. Defendant says there is no statute or charter provision of the City of Decatur authorizing petitioner to make this defendant personally liable for the paving assessment in question.

5. Defendant says that there are no statutes or charter powers of the City of Decatur giving the city the right to maintain said suit against this defendant or giving petitioner the right to recover a personal judgment against [fol. 63] this defendant on account of any special paving assessment.

6. Movant and defendant says that if any of the statutes of the State of Georgia or any of the charter provisions

of the City of Decatur be held as giving petitioner the right to impose a personal liability upon this defendant for and by virtue of any special paving assessment sought to be made against this defendant, then movant says that such statute or such charter provision, as thus construed, would be unconstitutional and violat-e of Article 7, Section 2, Paragraph 1, Code Section 6553 of the State of Georgia, for that said Code Section provides that all taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed * * * and shall be levied under general laws. Defendant says that to impose a personal liability upon this defendant for the cost of special paving improvements would violate said constitutional provision for equality and uniformity of taxation as provided for in said constitutional provision.

7. Movant and defendant says that under the law of the State of Georgia special paving assessments are imposed on property and that paving assessments for paving a street have been sustained by the Supreme Court of this State only because of benefit to particular property and that under such construction of the law of this State with reference to paving assessment, executions issued therefor do not run generally against the owner of the property, and that the instant suit is not authorized for it would be in contravention of the rules of law governing special paving assessments, and to allow a personal general judgment against this defendant, under the facts set out in this case, would be to abandon the theory of specific benefits which is the only basis upon which special paving assessments can be made under the laws of this State.

8. Defendant says that there is no law of the State of Georgia entitling plaintiff to collect the special paving assessment fi. fa. in question by a suit in equity undertaking [fol. 64] to obtain a general personal judgment against this defendant.

9. Defendant says that if by the proceedings in the present case seeking to enforce the fi. fa. in question, the plaintiff is claiming to act under and by virtue of the acts of the Legislature of the State of Georgia, Acts 1919, page 834 et seq. and the acts of the Legislature of the State of Georgia, approved August 12, 1924, Georgia Laws 1924, page 534 (The same being amendments to the charter of the

plaintiff) then defendant says that said act, and amendments, does not give the plaintiff the right to collect said fi. fa. by suit or to obtain a personal judgment against this defendant.

Defendant further says that if said act be so construed as to permit a personal liability or personal judgment to be recovered against this defendant that then said act, as thus construed, would be illegal, void and unconstitutional and violative of the Constitution of the State of Georgia, Article 7, Section 2, Paragraph 1, Codified in Georgia Code Section 6553, for that the said act, as thus construed, will permit plaintiff to recover a personal judgment against this defendant for a special paving assessment and will permit plaintiff to make a special paving assessment a personal liability upon this defendant, and in so construing said act or acts would be in contravention and in conflict with the said provision of the Georgia Constitution and that such construction of said act would further be unconstitutional and violative of the Constitution of the State of Georgia and the Federal Constitution in that said act, as thus construed, would deny to this defendant the right to equality and uniformity of taxation not only as guaranteed to this defendant by the said Georgia Constitution (Code Section 6553) but would also be in contravention of the equal protection of law guaranteed to this defendant by the 14th amendment to the Constitution of the United States, for that special paving assessments under the laws of the State of Georgia cannot be made a personal liability upon the owner of the property benefited and to permit such special paving assessment to be made a personal liability against this defendant would deprive this defendant of the [fol. 65] equal protection of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

10. Defendant says that if said act of 1919 and 1924 are construed by the court as permitting a recovery of a personal judgment of liability against this defendant for the special paving assessment in question, then such construction of said acts would render said acts and the ordinance passed thereunder, unconstitutional and violative of the Georgia Constitutional provisions as set out in Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that said construction would deprive said defendant of the

equal protection of the law therein provided and would unconstitutionally discriminate against this defendant and would deprive this defendant of its property without due process of law in violation of the said 14th amendment to the Constitution of the United States.

Movant says that if any statute or act of the State of Georgia be construed as permitting petitioner to obtain a personal judgment against this defendant or to hold this defendant personally liable for the special paving assessment in question, then that such Legislative act or acts as thus construed would render said acts illegal, void and unconstitutional as violative of Article 7, Section 2 and Paragraph 1 (Code Section 6553 of the State of Georgia) and said acts, as thus construed, would further be unconstitutional in that they would violate the Georgia constitutional provisions as set out in Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that such construction would deprive this defendant of the equal protection of the laws as therein guaranteed and provided; for that the law of this State, as construed by the Supreme Court of the State, is that there is no personal liability for special paving assessments, and to subject this defendant to a personal liability and a personal judgment for a special paving assessment would deprive this defendant of the equal protection of law as guaranteed to it by said State constitutional provisions and would also deprive this defendant of [fol. 66] its property without due process of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

11. Defendant further moved to dismiss said suit upon the ground that the petition in said case does not allege or claim that defendant received any benefit from the paving assessment in question, and that the paving assessment sought to be enforced against this defendant is not based or predicated upon any claim of benefits, there being no allegation or contention of benefits, and the said paving assessment not being based or predicated upon any claim of benefits and said suit not claiming or alleging any benefits to defendant, defendant moved to dismiss said suit upon the ground that the paving assessment and the ordinance in question are illegal, invalid and unconstitutional and violative of the 14th amendment to the Constitution of the

United States, for that said assessment and said paving ordinance there being no contention or allegation with reference to benefits, confiscates the property of the defendant and denies it the due process of law and the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States.

Defendant further moved to dismiss said petition for the reason that all other paving assessments, under the ordinance in question, and under the laws of the State of Georgia are based upon claimed benefits and the foundation of such assessment is predicated upon benefits, and that to base such paving assessment against other property upon the claim of benefits and to base said paving assessment against this defendant, without any claim of benefits, and not upon any contention or claim of benefits, would deny to defendant the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States, and for this reason would render said assessment illegal, invalid and unconstitutional.

Defendant further says that under the laws of the State of Georgia all other special paving assessments made against other property is not a personal liability against the owner of such other property and can only be enforced against the property benefited and that to construe the [fol. 67] charter amendment of the City of Decatur, heretofore set out, as holding that no personal liability can be rendered against the owners of such other property, but to hold that a personal liability can be enforced against this defendant would render said statute, as thus construed, unconstitutional for that it would deprive this defendant of the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States, for the said statute, as thus construed, would render an entirely different remedy against this defendant for the collection of a special paving assessment than is allowed against all other property owners.

The court passed an order upon said motion of this defendant and overruled each and every ground of said motion. The said order as rendered by the court being as follows:

"After argument the within motion is hereby overruled. This March 31, 1933. E. D. Thomas, Judge, S. C. A. C."

To said ruling of the court the defendant, Georgia Power Company, then excepted and now excepts and says that the court erred in not sustaining each and every one of the grounds of its motion to dismiss said petition, and says that the court erred in overruling each and every one of its said grounds of its said motion to dismiss said petition, and the Georgia Power Company then excepted and now excepts to the said ruling of said court and then and now excepts and says that the court erred in its said holding and erred in overruling each and every one of said grounds of its said motion and erred in not sustaining each and every one of said grounds of its said motion and defendant, Georgia Power Company, assigns error upon the said ruling of the court and says that the court erred in not sustaining each and every one of the contentions of the defendant, Georgia Power Company, as made in said motion, and erred in not dismissing said petition.

And now comes the Georgia Power Company, within the time allowed by law and files this its bill of exceptions pendente lite and prays that this its bill of exceptions pendente lite be certified to be true and ordered placed on [fol. 68] the minutes and filed as a part of the record in said case.

Colquitt, Parker, Troutman & Arkwright, Attorneys for Georgia Power Company.

Certificate

The foregoing bill of exceptions pendente lite are hereby approved and certified to be true and to have been tendered within the time allowed by law for the filing of bill of exceptions pendente lite and the bill of exceptions pendente lite are allowed and certified to be true within 30 days from the passage of the order complained of and within the time for the tendering and certification of bill of exceptions pendente lite.

Let the said bill of exceptions pendente lite, together with this certificate, be filed as part of the record in said case and placed upon the records and minutes of the superior court of Fulton County.

This 10 day of April 1933.

E. D. Thomas, Judge S. C. A. C.

[File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

BILL OF EXCEPTIONS PENDENTE LITE—Filed April 10, 1933

STATE OF GEORGIA,
Fulton County:

Be it remembered that on the 31st day of March 1933, before the Honorable E. D. Thomas, judge of the superior court of Fulton County presiding, there came on to be heard the case of City of Decatur vs. Georgia Power Company, Georgia Railway & Power Company and Georgia Railway and Electric Company, the same being an action to recover [fol. 69] a judgment against each one of the said named defendants to collect a certain special paving assessment.

The Georgia Railway & Power Company, one of the defendants in the above-stated case, moved to dismiss the petition filed in said case upon the following grounds:

1. Said petition does not set out sufficient facts to entitle plaintiff to the relief sought against this defendant.

2. Under the rules and principles of law the plaintiff is not entitled to the relief sought in the case at bar.

3. Under the facts and the principles of law governing special paving assessments petitioner is not entitled to a personal judgment against this defendant or to make this defendant personally liable for the paving assessment in question and is not entitled to have a general judgment rendered against this defendant for the special paving assessment in question.

4. Defendant says there is no statute or charter provision of the City of Decatur authorizing petitioner to make this defendant personally liable for the paving assessment in question.

5. Defendant says that there are no statutes or charter powers of the City of Decatur giving the city the right to maintain said suit against this defendant or giving petitioner the right to recover a personal judgment against this defendant on account of any special paving assessment.

6. Movant and defendant says that if any of the statutes of the State of Georgia or any of the charter provisions

of the City of Decatur be held as giving petitioner the right to impose a personal liability upon this defendant for and by virtue of any special paving assessment sought to be made against this defendant, then movant says that such statute or such charter provision, as thus construed, would be unconstitutional and violative of Article 7, Section 2, Paragraph 1, Code Section 6553 of the State of Georgia, for that said Code Section provides that all taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed * * * and shall be [fol. 70] levied under general laws. Defendant says that to impose a personal liability upon this defendant for the cost of special paving improvements would violate said constitutional provision for equality and uniformity of taxation as provided for in said constitutional provision.

7. Movant and defendant says that under the law of the State of Georgia special paving assessments are imposed on property and that paving assessments for paving of streets have been sustained by the Supreme Court of this State only because of benefit to particular property and that under such construction of the law of this State, with reference to paving assessment, executions issued therefor do not run generally against the owner of the property, and that the instant suit is not authorized for it would be in contravention of the rules of law governing special paving assessments, and to allow a personal general judgment against this defendant, under the facts set out in this case, would be to abandon the theory of specific benefits which is the only basis upon which special paving assessments can be made under the laws of this State.

8. Defendant says that there is no law of the State of Georgia entitling plaintiff to collect the special paving assessment fi. fa. in question by a suit in equity undertaking to obtain a general personal judgment against this defendant.

9. Defendant says that if by the proceedings in the present case seeking to enforce the fi. fa. in question the plaintiff in claiming to act under and by virtue of the acts of the Legislature of the State of Georgia, Acts 1919, page 834 et seq., and the acts of the Legislature of the State of Georgia, approved August 12, 1924, Georgia Laws 1924, page 534 (the same being amendments to the charter of the plaintiff),

then defendant says that said act, and amendments, does not give the plaintiff the right to collect said fi. fa. by suit or to obtain a personal judgment against this defendant.

Defendant further says that if said act be so construed as to permit a personal liability or personal judgment to [fol. 71] be recovered against this defendant that then said act, as thus construed, would be illegal, void and unconstitutional and violative of the Constitution of the State of Georgia, Article 7, Section 2, Paragraph 1, Codified in Georgia Code Section 6553, for that the said act, as thus construed will permit plaintiff to recover a personal judgment against this defendant for a special paving assessment and will permit plaintiff to make a special paving assessment a personal liability upon this defendant, and in so construing said act or acts would be in contravention and in conflict with the said provision of the Georgia Constitution and that such construction of said act would further be unconstitutional and violative of the Constitution of the State of Georgia and the Federal Constitution in that said act, as thus construed, would deny to this defendant the right to equality and uniformity of taxation not only as guaranteed to this defendant by the said Georgia Constitution (Code Section 6553) but would also be in contravention of the equal protection of law guaranteed to this defendant by the 14th amendment to the Constitution of the United States, for that special paving assessments under the laws of the State of Georgia cannot be made a personal liability upon the owner of the property benefited and to permit such special paving assessment to be made a personal liability against this defendant would deprive this defendant of the equal protection of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

10. Defendant says that if said act of 1919 and 1924 are construed by the court as permitting a recovery of a personal judgment or liability against this defendant for the special paving assessment in question, then such construction of said acts would render said acts and the ordinance passed thereunder, unconstitutional and violative of the Georgia constitutional provisions as set out in the Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that said construction would deprive said defendant of

the equal protection of the law as therein provided and would unconstitutionally discriminate against this de-
[fol. 72] fendant and would deprive this defendant of its property without due process of law in violation of the said 14th amendment to the Constitution of the United States.

Movant says that if any statute or act of the State of Georgia be construed as permitting petitioner to obtain a personal judgment against this defendant or to hold this defendant personally liable for the special paving assessment in question then that such Legislative act or acts as thus construed would render said acts illegal, void and unconstitutional as violative of Article 7, Section 2, and Paragraph 1 (Code Section 6553 of the State of Georgia), and said acts, as thus construed, would further be unconstitutional in that they would violate the Georgia constitutional provisions as set out in Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that such construction would deprive this defendant of the equal protection of the law as therein guaranteed and provided; for that the law of this State, as construed by the Supreme Court of the State, is that there is no personal liability for special paving assessments, and to subject this defendant to a personal liability and a personal judgment for a special paving assessment would deprive this defendant of the equal protection of law as guaranteed to it by said State constitutional provisions and would also deprive this defendant of its property without due process of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

11. Defendant further moved to dismiss said suit upon the ground that the petition in said case does not allege or claim that defendant received any benefit from the paving assessment in question, and that the paving assessment sought to be enforced against this defendant is not based or predicated upon any claim of benefits, there being no allegation or contention of benefits, and the said paving assessment not being based or predicated upon any claim of benefits and said suit not claiming or alleging any benefits to defendant, defendant moved to dismiss said suit upon the
[fol. 73] ground that the paving assessment and the ordinance in question are illegal, invalid and unconstitutional

and violative of the 14th amendment to the Constitution of the United States, for that said assessment and said paving ordinance, there being no contention or allegation with reference to benefits, confiscates the property of the defendant and denies it the due process of law and the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States.

Defendant further moved to dismiss said petition for the reason that all other paving assessments, under the ordinance in question, and under the laws of the State of Georgia are based upon claimed benefits and the foundation of such assessment is predicated upon benefits, and that to base such paving assessment against other property upon the claim of benefits and to base said paving assessment against this defendant without any claim of benefits, and not upon any contention or claim of benefits, would deny to defendant the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States, and for this reason would render said assessment illegal, invalid and unconstitutional.

Defendant further says that under the laws of the State of Georgia all other special paving assessments made against other property is not a personal liability against the owner of such other property and can only be enforced against the property benefited and that to construe the charter amendment of the City of Decatur, heretofore set out, as holding that no personal liability can be rendered against the owners of such other property, but to hold that a personal liability can be enforced against this defendant would render said statute, as thus construed, unconstitutional for that it would deprive this defendant of the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States, for the said statute, as thus construed, would render an entirely different remedy against this defendant for the collection of a special paving assessment than is allowed against all other property owners.

The court passed an order upon said motion of this de- [fol. 74] fendant and overruled each and every ground of said motion. The said order as rendered by the court being as follows:

"After argument the within motion is hereby overruled. This March 31, 1933. E. D. Thomas, Judge S. C. A. C."

To said ruling of the court the defendant, Georgia Railway & Power Company, then excepted and now excepts and says that the court erred in not sustaining each and every one of the grounds of its motion to dismiss said petition, and says that the court erred in overruling each and every one of its said grounds of its said motion to dismiss said petition, and the Georgia Railway & Power Company then excepted and now excepts to the said ruling of said court and then and now excepts and says that the court erred in its said holding and erred in overruling each and every one of said grounds of its said motion and erred in not sustaining each and every one of said grounds of its said motion and defendant, Georgia Railway & Power Company, assigns error upon the said ruling of the court and says that the court erred in not sustaining each and every one of the contentions of the defendant, Georgia Railway & Power Company, as made in said motion, and erred in not dismissing said petition.

And now comes the Georgia Railway & Power Company, within the time allowed by law and files this its bill of exceptions pendente lite and prays that this its bill of exceptions pendente lite be certified to be true and ordered placed on the minutes and filed as a part of the record in said case.

Colquitt, Parker, Troutman & Arkwright, Attorneys for Georgia Railway & Power Company.

Certificate

The foregoing bill of exceptions pendente lite are hereby approved and certified to be true and to have been tendered within the time allowed by law for the filing of bill of exceptions pendente lite and the bill of exceptions pendente lite are allowed and certified to be true within 30 days from the passage of the order complained of and within the time [fol. 75] for the tendering and certification of bills of exceptions pendente lite.

Let the said bill of exceptions pendente lite, together with this certificate, be filed as a part of the record in said case and placed upon the records and minutes of the superior court of Fulton County.

This 10 day of April, 1933.

E. D. Thomas, Judge S. C. A. C.

[File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted.]

MOTION FOR NEW TRIAL—Filed June 26, 1933.

Each of the defendants in the above-stated case, Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, come now at the term of court at which said verdict and judgment was rendered and within 30 days from the rendition of the same and move the court to set aside said verdict and judgment and to grant a new trial in said case upon the following grounds, to wit:

(1) Said verdict and judgment are contrary to law.

2. Said verdict and judgment are contrary to the evidence in said case.

3. At the conclusion of the evidence in said case the plaintiff, City of Decatur, moved for the direction of a verdict in its favor and the court directed the verdict rendered in said case in favor of the plaintiff, City of Decatur (it being stated as a fact that the verdict as rendered in said [fol. 76] case) was a directed verdict. Each of said defendants say that the direction of said verdict by the court in favor of the plaintiff, City of Decatur, was erroneous:

(a) For that no verdict should have been directed by the court in favor of the plaintiff in said case and the said verdict as directed in favor of the plaintiff was erroneous as a question of law and contrary to law and equity and unauthorized in law or equity.

(b) That the direction of said verdict in favor of the plaintiff was contrary to the evidence in said case, in that the evidence in said case did not demand a verdict in favor of the plaintiff in said case and the direction of said verdict by the court was contrary to law and the evidence in said case.

(4) It is stated as a fact that at the conclusion of the evidence in said case upon motion of the plaintiff, City of Decatur, the court directed a verdict in favor of the plaintiff and directed the verdict as entered in said case and each of said defendant- say that said verdict as directed by the

court was erroneous, for that the same was contrary to law and the evidence in said case. Movants say that under the law, the rules and principles of equity and under the evidence in said case the court should not have directed a verdict in favor of the plaintiff but should have directed a verdict in favor of the defendants. A verdict in favor of the defendants was demanded by the law, the rules and principles of equity and the evidence in said case and the court erred in directing a verdict against the defendants and in favor of the plaintiff in said case.

(5) Each of the defendants say that the court erred in not directing a verdict in its favor in said case and erred in not directing a verdict against the plaintiff, City of Decatur, for that under the law, the rules and principles of equity and the evidence in said case a verdict against the plaintiff, City of Decatur, was demanded and it was error for the court to direct the verdict as rendered in favor of the plaintiff, City of Decatur, and the verdict which the court instructed and directed the jury to find and which was found and rendered by the jury was erroneous.

[fol. 77] Colquitt, Parker, Troutman & Arkwright, Attorneys for defendants, Georgia Railway & Electric Company, Georgia Railway & Power Company, and Georgia Power Company.

[File endorsement omitted.]

Order

The foregoing motion for a new trial read and considered. The facts therein stated with reference to the direction of a verdict by the court and the entering of the judgment by the court as therein stated are true. The grounds of said motion are approved. It is ordered that the said motion be filed as part of the record in said case. Let the motion be served upon the plaintiff or its attorneys. Let the plaintiff show cause before me on or before the 29th day of July 1933, why the motion should not be granted. Let this order act as a supersedeas of said verdict and judgment until the further order of this court. In the meantime, and until the final hearing of this motion, whenever the same may be had, defendants and each of them are allowed time to amend and perfect the motion and to prepare, present for approval and

have approved and file a brief of the evidence in said case.
This 26th day of June, 1933.

G. H. Howard, Judge S. C. A. C.

Acknowledgment

Service of the foregoing motion for a new trial acknowledged and copy received; all other and further service waived. This 26 day of June, 1933.

John Wesley Weeks, Mark Bolding, Branch & Howard, Attorney- for Plaintiff, City of Decatur.

[fol. 78] In Superior Court of Fulton County

[Title omitted]

Amended Motion for New Trial—Filed Oct. 14, 1933

And now comes the Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, defendants in the above stated case, and separately and individually move the court to grant a new trial in the above-stated case and amends its motion for new trial heretofore filed in said case, and each for cause of amendment says:

1. Movant says that the verdict as directed by the Court, to wit:

"We the jury, find the issues in favor of the plaintiff, and that the plaintiff is entitled to collect the amount of $13,444.66 with interest thereon from June 21, 1926, at the rate of 7% per annum represented by the fi. fa. set out in the petition and that the plaintiff is entitled to a decree against Georgia Power Company and Georgia Railway & Power Company for the collection of said amounts.

W. C. Bennett, Foreman.

June 21, 193?"

was erroneous, as each of the movants contend, for the following reasons and upon the following grounds:

(a) The Georgia acts, under and by virtue of which the plaintiff, City of Decatur, undertook to make the special paving assessment in question did not give the municipality

the right to make any assessment against any street railway company which did not own the street railway and street railway tracks along or across which a street was to be paved, and movant says that the undisputed evidence in the case at bar shows that the tracks along and upon the street to be paved were owned at the time of said claimed [fol. 79] paving assessment by the Georgia Railway & Electric Company and no verdict or judgment or decree was rendered against said Georgia Railway & Electric Company but that the only verdict directed and the decree entered thereon was against the Georgia Railway & Power Company and the Georgia Power Company.

(b) That no paving assessment was made against any leasehold interest of the Georgia Railway & Power Company in and to the tracks along and across which the paving for which the assessment in question was sought to be made and that it was erroneous for the court to direct a general judgment against the Georgia Railway & Power Company when said company did not own the track or tracks running along or across the street paved and that it was error for the court to direct a general verdict against the Georgia Power Company.

Movant says that the undisputed evidence shows that the tracks along or across the street paved were owned by the Georgia Railway & Electric Company and that no verdict or judgment or decree was rendered against said company, and that the Georgia Railway & Electric Company—the company against which no verdict or judgment was directed, was the only constituent company by virtue of which the first Georgia Power Company (a predecessor of the present Georgia Power Co.,) acquired the street railway property located along or across the street paved, and that no assessment had been made against any leasehold interest of the Georgia Railway & Power Company in and to said street railway property.

(c) The undisputed evidence, as movant contends, showed that the Georgia Railway & Power Company only had a leasehold interest in and to the street railway property and street railway tracks located in and along the street being paved, and the undisputed evidence, as movant contends, shows that no assessment had been made against said leasehold interest, and it was error for the court to direct a gen-

eral, personal judgment against the Georgia Railway & Power Company, against a mere lessee.

[fol. 80] Movant contends that a special paving assessment is a proceeding *in invitum* and cannot be predicated upon any contractual obligations and that it was error for the court to direct a general personal verdict and to enter a general personal judgment against the Georgia Railway and Power Company.

(d) Movants, and each of them, say that the direction of the verdict against the Georgia Power Company was erroneous for that, as movant contends, no special paving assessment had been made against the said Georgia Power Company, and as movant contends, a special paving assessment is a proceeding in invitum and is not based upon contract or upon contractual obligations; and that it was erroneous for the court to direct a general personal verdict against the Georgia Power Company and to enter a general personal decree against the Georgia Power Company upon said directed verdict for that no special paving assessment had been made against said company and there was no basis upon which to direct a general personal judgment against the said Georgia Power Company.

(e) Movants and each of them contend that special paving assessment for the improvement of the street railway property is sustained in Georgia only because of benefits to the particular property against which the assessment was made and *and* that executions issued therefor do not run generally against the other property of the owner and that it was erroneous for the court to direct a general personal verdict against the Georgia Railway & Power Company for that the direction of such verdict would made a special paving assessment run generally against said company. It was further error to direct a general personal verdict against the Georgia Railway & Power Company for that, under the undisputed evidence, the said Georgia Railway & Power Company did not own the property located in and around the street being paved but only had a leasehold interest there therein and no special paving assessment had been made against its said leasehold interest.

Movant contends that the direction of a general personal verdict against the Georgia Railway & Power Company [fol. 81] was erroneous for that it made a special paving

assessment run against all the property of the Georgia Railway & Power Company, wherever located and whether located within or without the territorial limits of the plaintiff, City of Decatur.

(f) Movants and each of them contend that special paving assessment for the improving of street railway property is sustained in Georgia only because of benefits to the particular property against which the assessment was made and that executions issued therefor do not run generally against other property, or the other property of the owner not situated upon the street improved and receiving no benefit from the improvement.

Movant contends that it was error for the court to direct a general verdict against the Georgia Power Company for that the general personal verdict directed against the Georgia Power Company rendered the Georgia Power Company liable for a special paving assessment not made against it or its property and made the said Georgia Power Company liable for said special paving assessment without regard to where the property of the Georgia Power Company was located, whether within or without the territorial limits of the City of Decatur.

2. Each of the defendants separately say that the direction of the verdict in the case at bar was erroneous for that under the undisputed evidence in said case it was shown that the suit in question was barred by the statute of limitations. The Statute of Limitations was specially pleaded by each of said defendants as a defense in said case and the defendants say that the court erred in not sustaining said statute of limitations, for as movant contends the undisputed evidence showed that the present suit was barred by the statute of limitations and that the plea of the statute of limitations was sustained, as movant contends, by the undisputed evidence. And movants and each of them say that the court erred in not sustaining the said statute of limitations and erred in directing a personal verdict against the Georgia Railway & Power Company and erred in directing a personal verdict against the Georgia Power Company, and erred in entering a personal money judgment and decree against each of said named defendants.

[fol. 82] 3. Movants and each of them say that the court erred in directing the following verdict.

"We the jury find the issues in favor of the plaintiff and that the plaintiff is entitled to collect the amount of $13,444.66 with interest thereon from June 21, 1926, at the rate of 7% per annum represented by the fi. fa. set out in the petition and that the plaintiff is entitled to a decree against Georgia Power Company and Georgia Railway & Power Company for the collection of said amounts.

W. C. Bennett, Foreman.

June 21, 1933."

Movant contends that the direction of said verdict was erroneous for the following reasons:

(a) If a suit could be maintained to recover a general personal verdict for paving assessment then movant contends that such personal verdict could be directed only for the amount of the special benefit resulting from the improvement in question, and that in the case at bar, there was no evidence showing any benefit of any kind or character to the property or to either of the defendants against whom the general personal verdict was directed and there was no basis for the direction of the verdict for the amount as directed.

Movant says that the court erred in holding that the question of benefits was not relevant or material and in directing the verdict as rendered against the Georgia Power Company and the Georgia Railway & Power Company for movant contends that there was no evidence in said case to show that either of said companies or that the property of either of said companies received any direct or indirect benefits from the paving assessment in question. And movant contends that there was no evidence in said case upon which to sustain a directed verdict for the amount rendered against each of said defendants.

(b) Movants and each of them say that the direction of a general verdict against the Georgia Power Company and the Georgia Railway & Power Company for the principal sum of $13,444.66, with interest thereon from June 21, 1926, was erroneous for that there was no evidence in said case [fol. 83] to show any benefits derived from the special paving assessment in question by either the Georgia Railway & Power Company or the Georgia Power Company.

Movant and each of them say that the direction of a general personal verdict in the case at bar deprived each of the defendants of the equal protection of the law and the due

process of law as guaranteed to them by the 14th amendment to the Constitution of the United States for that movant contends that each of them are entitled to the same constitutional protection accorded to others under the said 14th amendment to the Constitution and that the general personal verdict could not be rendered against the Georgia Railway & Power Company and the Georgia Power Company for an amount in excess of the special benefits received by each of said companies or the property of each of said companies for the improvement or paving in question; and movant contends that there was no contention and no evidence to show that either of said companies or the property of either of said companies received any benefit whatever from the street improvement in question. And movant says that the verdict as directed was far in excess of any special benefits of any kind or character accruing to either the Georgia Railway & Power Company or the Georgia Power Company, or the property of either of said companies by virtue of the improvement or paving in question.

(c) Movants and each of them say that the said verdict, as rendered by the jury, was erroneous and the decree entered thereon was erroneous for that the mode and method of collecting said special paving assessment as provided by the charter of the plaintiff (City of Decatur) was exclusive and that there was no provision in the charter of the City of Decatur or in the general law of the State of Georgia authorizing the rendition of a personal judgment against any one of the defendants or movants, and that the direction of a general personal money judgment and the rendition of said money judgment and the decree thereon was erroneous in that there was no statutory provision authorizing the rendition of a personal money judgment against any of the movants and the said verdict as directed and said verdict as [fol. 84] rendered, and the judgment thereon, was erroneous as a matter of law.

4. Movants and each of them say that the verdict as directed and rendered in said case and the decree as entered thereon was erroneous as a matter of law, for that the mode and method provided in the charter of the City of Decatur for the collection of the special paving assessment in question is exhaustive and exclusive and there is no statutory law or statute in Georgia giving the plaintiff the right by either common law or equitable remedy to obtain a personal money

verdict and judgment against movants or any of them for a personal judgment or recovery of the special paving assessment in question.

(a) Movants and each of them say that the statutory remedy for the collection of the special paving assessment in question is exclusive and does not warrant the direction or the rendition of any special money judgment against movants or any of them and that for said reason said verdict and said verdict as directed and rendered was erroneous as a matter of law and the decree entered thereon was erroneous as a matter of law.

(b) Movants and each of them say that said verdict and decree was erroneous for there was not only no statutory provision authorizing the rendition of a personal money judgment again movants or any of them, but there was no ordinance of the City of Decatur authorizing a proceeding to obtain any personal suit or to obtain any personal judgment against movants or any of them; and that said verdict as rendered and the decree thereon was erroneous for that it was not in accordance with any statutory law of the State of Georgia or in accordance with any ordinance or ordinances claimed to have been enacted by the City of Decatur.

(5) Movants say that the court not only directed the jury to find in favor of the plaintiff in the amount of $13,444.66 but also directed the jury to find interest upon said amount "from June 21, 1926 at the rate of 7 per cent. per annum represented by the fi. fa. set out in the petition and that the jury following the direction of said court rendered a verdict for interest upon said amount" (To wit, $13,444.66) from [fol. 85] June 21, 1926 at the rate of 7 per cent. per annum represented by the fi. fa.

Movants and each of them say that the rendition of said verdict, as directed and rendered, and the decree in conformance therewith finding interest upon said amount as above set out, was erroneous:

(a) For the reason that the plaintiff in said case was not following any statutory method or methods provided for the levy, assessment or collection of said special assessment. Movants and each of them say that the rendition of any verdict against movants or any of them for interest upon any claimed indebtedness for special paving assessment was

erroneous for that taxes or special assessments are not debts so as to render any interest due upon the same, and that the plaintiff, City of Decatur, was not entitled to recover any interest upon any claimed tax or special assessment, and movants and each of them say that it was error for the court to instruct the jury to find interest at 7 per cent. upon said amount from June 21, 1926, and it was error for the jury to find said interest as a part of the verdict rendered in said case and it was error to enter a judgment or decree covering said interest.

Movants and each of them contend that under the law of the State of Georgia said special assessment is not a debt and cannot be made the basis of any recovery for interest and that the direction of a verdict for interest and the rendition of a verdict for interest was erroneous as a matter of law.

(b) Movants and each of them say that there was no evidence in said case upon which to base any claim for interest. Movants and each of them (while denying the right of any personal judgment against any of them for the special paving assessment in question) specially say that a verdict finding interest was erroneous for that special paving assessment cannot exceed special benefits either to the property or to the parties sought to be made liable therefor and that there was no evidence in said case to show the amount of special benefit to any of the property of any of the movants [fol. 86] and there was no evidence to show any special benefit to any of the defendants or movants; and movants contend that it was error for the court to direct and for the jury to find a verdict for any interest in said case for the reason that there was no evidence in said case upon which to find any such verdict.

6. Because the court erred, as movants and each of them contend, in admitting over the objection of movants a certified copy of the annual tax return of the Georgia Railway & Power Company, lessee of the Georgia Railway & Electric Company, made on Jan. 1, 1925, to the Comptroller General of the State of Georgia, as follows:

Annual Return for Taxation

On the Georgia Railway & Power Company, Lessee, Georgia Railway & Electric Company Street Railroad Company of all property owned by said company on the January 1, 1925, made to the Comptroller-General by the President, in pursuance with law, without deducting the indebtedness of said Company:

Cities or towns	Main & side track miles	Value	Value of real estate	Trolley and wires and poles and electric overhead & underground construction & steam heat & gas mains	Value of track and real estate	Value of franchise	Pro rate value personal property	Aggregate value in County
Decatur.....	6.2	81,471	4,500	36,311	122,282	100,699	32,948	255,929

[fol. 87] Movants and each of them at the time the same was offered objected to the same on the following grounds:

(a) That it was entirely irrelevant and immaterial. That it could have no bearing upon the issues of questions involved in said case.

(b) Movants and each of them objected to said evidence and to the portion of said tax return at the time the same was offered to wit, "Value of Real Estate, $4,500." for the reason that the said evidence was irrelevant and immaterial; that it was not contended that the special assessment in question was made against any particular real estate and it is not shown where said real estate was located, and that the return with reference thereto was irrelevant and immaterial.

(c) Movants and each of them specially and separately objected to the item, "Trolley Wires and Poles and Electric Overhead and Underground construction & Steam heat & Gas mains, $36,311." for the reason that the said portion of said return was irrelevant and immaterial.

(d) Movants and each of them specially objected to the portion of said return, to wit "Pro-rata Value Personal Property, $32.948." for the reason that same was irrelevant and immaterial.

(e) Movants and each of them specially and separately objected to the item, "Value of Franchise, $100,699." in the annual tax return, as being irrelevant and immaterial.

At the time the same was offered, movants objected to said portion of said evidence herein set out as being irrelevant and immaterial and upon the further ground that the franchise of the street railway company and the entire franchise, together with all the property of the street railway company, used in street railway operation, was tendered to the plaintiff in payment of the assessment in question and that the assessed value thereof or the amount returned for taxes in the "Annual Return for Taxation" of the Georgia Railway & Power Company, as lessee, was irrelevant and immaterial.

The court overruled each and every one of said objections and allowed and admitted said tax return in evidence over [fol. 88] the said objection of movants and each of them, and movants say that it was error for the court to overrule

said objections and each of them and that said objections and each of them were valid and legal objections and should have been sustained. The court in overruling said objections held that under the order of Judge Thomas ruling on the demurrer in said case, said entire Return for Taxation was admissible in evidence movants and each of them say that the ruling was erroneous and that the court erred in admitting said evidence and in not sustaining each of the objections made to the same.

7. Because the court erred, as movants contend, in admitting over objection of movants and each of them, that portion of the Annual Return for Taxation of the Georgia Railway & Power Company, lessee of the Georgia Railway & Electric Company, on January 1, 1925, as follows, to wit: "Pro rata Value Personal Property, $32,948."

Movants and each of them at the time said evidence was offered objected to the same upon the following grounds:

(a) Said evidence was irrelevant and immaterial. Personal property could not be made the basis of any special assessment and to allow personal property of the company and the value of personal property to be considered in a paving assessment or in arriving at a paving assessment would deprive movants and each of them of the equal protection of the law as guaranteed to them by the fourteenth amendment to the Constitution of the United States for that with reference to all other persons and all other special paving assessments, personal property and the value thereof, was not considered, as a basis for paving assessments or at arriving at the amount of paving assessment and that said evidence was irrelevant and immaterial and should not be used as a basis for or considered in arriving at a special paving assessment against movants or any of them; that to have same considered in making a paving assessment against movants would deprive them of their constitutional right of the equal protection of the law as guaranteed by the fourteenth amendment of the Constitution of the United States, for with reference to all other persons (than movants) personal property was not considered in making paving assessments.

[fol. 89] The court overruled each and every one of said objections and allowed and admitted said portions of the tax return objected to and the entire tax return in evi-

dence over the said objection of movants and each of them, and movants say that it was error for the court to overrule said objections and that said objections and each of them were valid and legal objections and should have been sustained. The court in overruling said objections held that under the order of Judge Thomas, ruling on the demurrer in said case, said entire Return for Taxation was admissible in evidence. Movants and each of them say that the ruling was erroneous and that the court erred in admitting said evidence and in not sustaining each of the objections made to the same.

8. Because the court erred, as movants and each of them contend, in admitting over objections of movants, a certified copy of the "Annual Return for Taxation," of the Georgia Railway & Power Company, Lessee of the Georgia Railway & Electric Company, made January 1, 1926, to the Comptroller-General of the State of Georgia, as follows:

"Annual Return for Taxation

On the Georgia Railway & Power Company, Lessee, Georgia Railway & Electric Company Street Railroad Company of all property owned by said company on Jan. 1, 1926, made to the Comptroller General by the President, in pursuance with law, without deducting the indebtedness of said Company:

Cities or towns	Main & Side Track Miles	Value	Value of Real Estate	Trolley wires and poles and electric overhead & Underground construction & Steam Heat and gas mains	Value of Track and real estate	Value of Franchise	Pro Rata value Personal Property	Aggregate value in County
Decatur.....	6,267	4,500	39,311	125,282	103,067	81,471	34,604	262,953

[fol. 90] Movants and each of them at the time the same was offered objected to the same on the following grounds:

(a) That it was entirely irrelevant and immaterial. That it could have no bearing upon the issues or questions involved in said case.

(b) Movants and each of them objected to said evidence and to the portion of said tax return at the time same was offered, to wit, "Value of Real Estate, $4,500," for the reason that the said evidence was irrelevant and immaterial that it was not contended that the special assessment in question was made against any particular real estate and it is not shown where said real estate was located, and that the return with reference thereto was irrelevant and immaterial.

(c) Movants and each of them specially and separately objected to the item, "Trolley Wires and Poles and Electric Overhead, etc., $39,311.", for the reason that the said portion of said return was irrelevant and immaterial.

(d) Movants and each of them separately objected to the item, "Pro-rata Value Personal Property, $34,604," for the reason that said portion of said return was irrelevant and immaterial.

(e) Movants and each of them separately and specially objected to the item, "Value of Franchise, $103,067" on the annual tax return as being irrelevant and immaterial.

At the time same was offered, movants objected to said portion of said evidence herein set out as being irrelevant and immaterial and upon the further ground that the franchise of the street railway company and the entire franchise, together with all the property of the street railway company, used in street railway operation, was tendered to the plaintiff in payment of the assessment in question and that the assessed value thereof or the amount returned for taxes in the "Annual Return for Taxation" of the Georgia Railway & Power, as lessee, was irrelevant and immaterial.

The court overruled each and every one of said objections and allowed and admitted said tax return in evidence over the said objection of movants and each of them, and movants say that it was error for the court to overrule said [fol. 91] objections and each of them and that said objections and each of them were valid and legal objections and

should have been sustained. The court in overruling said objections held that under the order of Judge Thomas, ruling on the demurrer in said case, said entire Return for Taxation was admissible in evidence. Movants and each of them say that the ruling was erroneous and that the court erred in admitting said evidence and in not sustaining each of the objections made to the same.

Because the court erred, as movants contend, in admitting over objection of movants and each of them, that portion of the annual Return for Taxation, of the Georgia Railway & Power Company, lessee of the Georgia Railway & Electric Company, on January 1, 1926, as follows, to wit: "Pro rata Value Personal Property, $34,604."

Movants and each of them at the time said evidence was offered objected to the same upon the following grounds:

(a) Said evidence was irrelevant and immaterial. Personal property could not be made the basis of any special paving assessment and to allow personal property of the company and the value of personal property to be considered in a paving assessment or in arriving at a paving assessment would deprive movants and each of them of the equal protection of the law as guaranteed to them by the fourteenth amendment of the Constitution of the United States for that with reference to all other persons and all other special paving assessments, personal property and the value thereof, was not considered, as a basis for paving assessments or at arriving at the amount of paving assessment and that said evidence was irrelevant and immaterial and should not be used as a basis for or considered in arriving at a special paving assessment against movants or any of them; that to have same considered in making paving assessment against movants would deprive them of their constitutional right of the equal protection of the law as guaranteed by the fourteenth amendment of the Constitution of the United States, for with reference to all other persons (than movants) personal property was not considered in making paving assessments.

The court overruled each and every one of said objec- [fol. 92] tions and allowed and admitted said tax return in evidence over the said objection of movants and each of them, and movants say that it was error for the court to overrule said objections and that said objections and each of them were valid and legal objections and should

have been sustained. The court in overruling said objections held that under the order of Judge Thomas, ruling on the demurrer in said case, said entire Return for Taxation was admissible in evidence. Movants and each of them say that the ruling was erroneous and that the court erred in admitting said evidence and in not sustaining each of the objections made to the same.

10. Because the court erred, as movants and each of them contend, in refusing to allow, over the objection of plaintiff, the franchise under which the street railway lines in question and the street railway lines along the street being paved were constructed and being operated. The said franchise which the court refused to allow in evidence being as follows:

"An ordinance granting the right of the Georgia Railway & Electric Company to remove and to discontinue the operation of the tracks and structures formerly known as the Atlanta Railway Company in the Town of Decatur, Georgia, under certain conditions and restrictions in said ordinance set forth.

"Whereas, the said Georgia Railway and Electric Company, which has succeeded to all the property rights and franchises of said Atlanta Railway Company, did heretofore commence to tear up the tracks and other structures formerly known as the Atlanta Railway Company in said Town of Decatur, with the intention of discontinuing the operation of said line of railway.

And, whereas, said Georgia Railway and Electric Company was prevented from removing said structures, and from discontinuing the operation of said line of Railway by a temporary restraining order granted by the judge of the superior court of Fulton County upon the petition of said Town of Decatur against said Georgia Railway and Electric Company, which said petition is now pending in said court and returnable to the March Term, 1903;

[fol. 93] And, whereas, the President, Vice-President and Manager of said Georgia Railway & Electric Company have appeared before the Mayor and Council of said Town of Decatur on several occasions, and urgently requested that said Georgia Railway & Electric Company be allowed by said Mayor and Council to take up and discontinue the operation of said Atlanta Railway Line, urging as a reason

for such action by said Mayor and Council that, if allowed to take up and discontinue said line known formerly as Atlanta Railway Company, said Georgia Railway & Electric Company could and would give to the citizens of said Town of Decatur, better street car facilities upon another parallel line of street railway between the City of Atlanta and the Town of Decatur owned by said Georgia Railway & Electric Company and formerly known as the Atlanta Rapid Transit line, the same being the line of street railway running from Atlanta to Decatur along the Georgia Railroad and immediately north thereof:

"Now, therefore, be it ordained by said Mayor and Council, and it is hereby ordained by said authority, that the authority, right, permission and consent are hereby granted to said Georgia Railway and Electric Company to discontinue the operation of, abandon and remove the tracks, poles and other structures constituting the street railway line referred to and known as the line of the Atlanta Railway Company in the Town of Decatur, extending along and over the following route in said Town of Decatur, to wit:

Entering said town on the western side thereof at what is known as Swanton Hill, and running thence in a northeasterly direction until it strikes what is known as Electric Avenue; thence along said Electric Avenue in a northerly direction to Atlanta Street; thence along Atlanta Street in an easterly direction to South Court Square, which is a continuation of Atlanta Street; thence along said South Court Square to McDonough Street; thence south along McDonough Street to Depot or Harring Street; thence in a southeasterly direction along Depot or Herring Street to North Railroad Avenue; thence east along said North Railroad Avenue to the eastern limit of said town; and con- [fol. 94] tinuing east a short distance beyond said town limit; thence running north, and running north about the distance of two blocks, thence turning west, and running west until it again strikes the eastern limit of said town where said limit crosses Broad Street; thence continuing west along said Broad Street in said town to the North Court Square, which is a continuation of said Broad Street; thence continuing west along said North Court Square to West Court Square; thence along West Court Square to

South Court Square where said line connects with the same line described as entering said town, forming a loop; upon the conditions and restrictions hereinafter specified.

Section 2. Be it further ordained, that in consideration of the above mentioned rights granted by said town to said Georgia Railway & Electric Company, and in consideration of the benefits that said Georgia Railway and Electric Company will derive from discontinuing and taking up the structures comprising said Atlanta Railway Company, the said authority, rights, and privileges above referred to are granted and conferred only upon conditions that this ordinance shall first be accepted by said Georgia Railway & Electric Company and that said Georgia Railway & Electric Company, its successors and assigns, whether by contract or by operation of law, shall be bound to do the following things, to wit:

First: Upon the removal of the tracks and structures above referred to, to restore the surface of those streets from which such tracks and structures shall be removed to as good condition as the same are now in.

Second: To never charge more than five cents for one fare upon its main Decatur line, above referred to as the Rapid Transit Line, for one passenger, and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur or from the terminus of said line in the Town of Decatur to the terminus of the same in the City of Atlanta and the trip either way shall include the entire loop in the Town of Decatur, hereinafter described, though a greater fare may be charged when passengers are transported between the hours of 12 o'clock midnight and five o'clock [fol. 95] a. m.; the said Rapid Transit Line above referred to having the following route, to wit:

Commencing in the City of Atlanta at the intersection of Peachtree Street and Edgewood Avenue and running thence in an easterly direction along Edgewood Avenue to Hurt Street; thence in a southerly direction along Hurt Street to Decatur Street; thence along Decatur Street, which is immediately north of the Georgia Railroad, in an easterly direction to a point where said street is intersected by the line between the Counties of Fulton and DeKalb, thence continuing in the same general direction, immedi-

ately north of said Georgia Railroad until it intersects the western limit of said Town of Decatur where it crosses North Railroad Avenue; thence continuing in the same direction in the Town of Decatur along said North Railroad Avenue to North Candler Street thence along North Candler Street north to a short distance to a continuation of said North Railroad Avenue, thence in an easterly direction along said continuance of said North Railroad Avenue to Oak Street, then north along Oak Street to Broad Street, thence west along said Broad Street to East Court Square; thence south along East Court Square to South Court Square, thence west along said South Court Square to McDonough Street, thence south along said McDonough Street to said North Railroad Avenue, there connecting with said line a short distance from where it enters said Town of Decatur coming from Atlanta and forming a complete loop within the Town of Decatur.

Third. To grant one transfer ticket upon the payment of one full fare for the purpose of giving one continuous ride from any point within the Town of Decatur upon said Rapid Transit line to any point within the City of Atlanta on any of its lines in said city, and vice versa, which does not result however in carrying the passenger on a parallel line, or in the same general direction from which he came, provided such transfer is requested at the time of the payment of the fare, and provided the passenger shall abide by such reasonable rules and regulations as the company may make, so as to limit the time in which such transfer is used, in order that it may be available only for the first [fol. 96] connecting car, and in order to cover such other matters as the company may deem necessary or proper to protect the company from imposition, abuse, or assignment of such transfer, and to avoid liability in damages from mistakes that may be made by the passengers or the employees in regard to such transfer.

Fourth. To gradually from time to time, as it may obtain permission so to do and may have funds available for such purpose, double track said Rapid Transit line from terminus to terminus, the loop already described in the Town of Decatur being considered a double track; provided the time within which said double track shall be completed does not exceed five years, in the event it can obtain

permission to construct said double track, which said double track, when completed shall be maintained in a substantial safe and expeditious manner and shall be operated with care and rolling stock kept in a safe and comfortable condition. Permission to construct said double track in the Town of Decatur is hereby granted.

Be it further ordained that the terms of this ordinance shall be accepted by said Georgia Railway and Electric Company, at a meeting of its board of directors, so that the same may appear upon the minutes of said board of directors, within thirty days from the passage thereof, and the terms of this ordinance shall not be effective until so accepted, and an agreement embodying the terms thereof shall have been entered into by the said Town of Decatur and said Georgia Railway & Electric Company, executed by the Mayor and Clerk of said town, on the part of said town, and by the President and Secretary of said Company, or by such officers of said company as under its charter are authorized to execute deeds to realty, which agreement shall in addition to the above terms, reconvey to said town any rights, grants or franchises that said Georgia Railway and Electric Company may have acquired within said Town of Decatur as successor to the rights, grants and franchises of the said Atlanta Railway Company acquired from said Town of Decatur.

Section 3. Be it further ordained that all ordinances or [fol. 97] parts of ordinances in conflict herewith are hereby repealed.

"Be it resolved by the Board of Directors of the Georgia Railway & Electric Company that the ordinances adopted by the Mayor and Council of the Town of Decatur on March 3rd, 1903, conferring the right and authority upon this company to discontinue the operation of, abandon and remove the tracks and poles and other structures constituting the street railway line known as the Atlanta Railway Line in said Town of Decatur, and covering the route described in said ordinance, be and the same is hereby accepted upon the terms set forth in said ordinance and the terms and conditions set forth in said ordinance to be approved by this company are hereby agreed to by it in consideration of the right to remove said line conferred by said ordinance.

Be it further resolved that the President and Secretary of this Company are hereby authorized to sign and enter into with said Town of Decatur in the name of and on behalf of this Company, an agreement embodying the terms of said ordinance in accordance with the requirements of said ordinance.

This agreement made this 1st day of April, 1903, by and between the Town of Decatur, a municipal corporation in the County of DeKalb, State of Georgia, acting by and through its Mayor and Council party of the first part, and the Georgia Railway & Electric Company, a corporation under the laws of Georgia with its principal office in the County of Fulton, party of the Second Part, witnesseth, that,

Whereas, the Mayor and Council of said Town of Decatur did on March 3rd, 1903, adopt an ordinance, a copy of which is hereto attached and made a part hereof;

And, whereas, the terms of said ordinance were accepted by the said Georgia Railway & Electric Company, at a meeting of its Board of Directors held on March 31, 1903, a copy of the resolution adopted by said Board of Directors being hereto attached and made a part hereof.

Therefore, in accordance with the provisions in said [fol. 98] ordinance and in consideration of the mutual covenants and agreements herein contained, the parties hereto contract and agree with each other as follows:

1. Party of the first part hereby confers the authority, right, permission and consent of said Georgia Railway & Electric Company, and contracts and agrees that said Company shall be allowed and permitted to at once discontinue the operation of, abandon and remove the tracks, poles and other structures constituting the street railway line, known as the line of the Atlanta Railway Company in the Town of Decatur and extending along and over the route in said Town of Decatur and specified in said ordinance.

2. The said Town of Decatur further agrees to do and perform all things provided to be done or performed on its part by the ordinance hereinbefore referred to.

3. In consideration of the benefit of said party of the second part from discontinuance, abandonment and removal of the said line of railway hereinbefore referred to,

and in further consideration of the benefits to be deprived by it from the performance on the part of the Town of Decatur of the provisions undertaken to be performed by it under said ordinance said party of the second part hereby contracts and agrees with the said Town of Decatur that it, (the said Georgia Railway and Electric Company), will, upon its part, do and perform all things specified in said ordinance to be done and performed by it, and will keep and observe the conditions and terms of said ordinances.

4. Said Georgia Railway & Electric Company further hereby surrenders to said Town of Decatur the franchise formerly belonging to the Atlanta Railway Company, in said Town of Decatur, and conveys and quit-claims to the said Town of Decatur all right, title or interest which the said Georgia Railway & Electric Company has or may have had in and to the said franchise owned by the Atlanta Railway Company, in the said Town of Decatur.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year hereinabove written as the date hereof; the Town of Decatur acting by and through its Mayor and Clerk, and the Georgia Railway & [fol. 99] Electric Company acting by and through its President and Secretary, all hereunto authorized, executed in duplicate.

Town of Decatur (Seal), by J. W. Mayson, Mayor. L. J. Steele, Clerk. (Seal of Town of Decatur.) Signed, sealed and delivered as to the Town of Decatur, in DeKalb County, Georgia, in the presence of Ben E. Ragsdale. W. M. Ragsdale, Ordinary.

Georgia Railway & Electric Company (Seal), by P. S. Arkwright, President. Thos. K. Glenn, Secretary. (Seal of Georgia Railway & Electric Co.) Signed, sealed and delivered as to Georgia Ry. & Elec. Co. in the County of Fulton, State of Georgia in the presence of L. P. Paire. R. E. Cullinane, Notary Public, Fulton Co., Ga."

The only objection made to the admission of said franchise in the evidence was that the same was irrelevant and immaterial.

Movants and each of them contend that the court erred in refusing to allow said franchise in evidence and contend

that said franchise was relevant and material, for that it was relevant as showing the municipal franchise under and by virtue of which the particular line was constructed and being operated, and that the said franchise was relevant and material for the reason that movants expected to go further and show that the special paving assessment in question does not and cannot increase the value of the street railway property of movants or any of them and that the street railway property, under and by virtue of the franchise under which it was constructed and operated, received and could receive no benefits from the special paving assessment in question.

Movants and each of them further contended that the said municipal franchise was relevant and pertinent as showing a separate and distinct municipal franchise from [fol. 100] the City of Decatur with reference to the particular line in question and the line located along and in the street paved.

Movants and each of them contended that said franchise was relevant and pertinent and was offered for the further purpose of showing a separate and distinct franchise from the City of Decatur with a view to showing, in connection with the franchise, that the paving in question was done upon a portion of the street occupied by the street railway under and by virtue of this franchise and that the whole of this franchise and the entire street railway line and property was offered to be surrendered to the City of Decatur to prevent an assessment against it for the paving in question, and prior to the adoption of the ordinance the plaintiff, (City of Decatur) refused to accept this surrender and the paving ordinance was passed; and since that time, the entire street railway line together with the franchise have been tendered to the City of Decatur. It being stated to the court at the time of offering said franchise, that this evidence with the other evidence just heretofore stated, was relevant as showing that this was a separate franchise with reference to the line in the City of Decatur, and that not only was tender made of the particular portion of the street railway covered by said paving ordinance but with reference to the whole of the street railway line in Decatur and with reference to the entire franchise.

At the time of offering said franchise, movant further stated that they expected by offering said franchise, to

show a separate franchise, and that no value was received by virtue of the street paving and that this franchise was relevant upon the question of benefits—it being contended by movants and each of them, that the street railway company is entitled to the same benefit which sustains special paving assessments against other parties and the street railway company and its property must receive benefits to sustain the paving assessment against it and its property, and that this franchise was one of the steps and one of the links of the evidence offered by movants and each of them as sustaining the contention of movants that not any of them or the property of any of them had received any benefits from the street paving assessment in question. The court refused to allow said franchise in evidence, [fol. 101] and held that the same was irrelevant and immaterial and that under the ruling of Judge Thomas overruling each of the movants' motion to dismiss the petition, the question of benefits or lack of benefits was irrelevant and immaterial, and movants say that this ruling of the court was erroneous and that the said franchise was admissible in evidence and was relevant and material evidence, movants stating that they expected to show by other witnesses in this connection that no special benefits were received by movants or any of them or the property of any of them from the special paving assessment in question.

11. Because the court erred, as movants and each of them contend, in refusing to allow the following letter from P. S. Arkwright, President of the Georgia Power Company, to Mr. Looney, City Manager of Decatur, to wit:

"DEAR MR. LOONEY:

"On my return to the City Mr. Butler brought to my attention your notice with reference to the paving of Ponce de Leon Avenue from Oak Street in the City of Decatur.

"This Company can neither do this paving itself nor pay for it should the City of Decatur do it. The particular line is being operated at a very considerable loss and has been sustaining such loss over a long period, and the prospects are that it will continue to be operated at a loss as long as it is operated at all.

"This additional paving burden which, if enforced against us would involve us in an expense of from $21,000 to $25,000 is more than the line can bear. Under these circumstances,

we would be willing to surrender to the City of Decatur the franchise for this line and remove these tracks from the streets. To this end I have written Mr. L. J. Steele, City Attorney, a letter, copy of which is enclosed.

"I respectfully request that some way be found not to enforce this paving charge against us, as of course we would rather not surrender the franchise if it can be avoided. Yours very truly, P. S. Arkwright, President."

The objection made to admission of said evidence by the plaintiff, City of Decatur, was: First, that it is merely an offer to compromise this claim, which is never admissible in evidence. Second: We object to it on the ground that it constitutes no defense to this action nor any part of any defense.

[fol. 102] Movants and each of them contended that said evidence was relevant and material on the question of benefits and as showing that prior to the paving in question the City of Decatur was put on notice that movants and movants' property would and could receive no benefit from the paving and that prior to the paving in question and the paving assessment in question the plaintiff was put on notice that no benefits would be received by movants or any of movants' property from the paving and they would be willing to surrender and cease operating under the said franchise in Decatur.

The court sustained the objection of plaintiff and refused to allow said letter in evidence, holding that under the state of the pleadings and the decision of Judge Thomas overruling the demurrer to the petition, the said letter was not admissible and that the question of benefits or lack of benefits for the paving assessment in question was not relevant nor material.

Movants and each of them say that it was error for the court to exclude said letter and that it was error for the court to hold that the benefits or lack of benefits was irrelevant and immaterial, and error for the court to exclude said letter and not to admit the same together with the other evidence which movants stated they expected to introduce with reference to showing that none of the movants and none of movants' property would or could receive any benefits from the special paving assessment in question.

12. Because the court erred, as movants and each of them contend, in refusing to allow the following letter from

P. S. Arkwright, President of the Georgia Power Company, to Mr. L. J. Steele, City Attorney, of the City of Decatur, to wit:

"DEAR MR. STEELE:

Your letter of July 7th, with reference to paving Oak Street from the Georgia Railway to Ponce de Leon Avenue, and paving Ponce de Leon avenue from the Court house east, has been received.

"In order to meet the cost of this paving and the track reconstruction incidental thereto, it would be necessary for [fol. 103] this company to pay from $21,000 to $25,000, dependent on the plan adopted for the work.

"This street railroad line is now, and has been for a long time past, operated at a very great loss. Under existing conditions it is impossible to make this line pay the cost of operation. As an inevitable result of this condition the line cannot bear the burden of this paving cost.

"If the City of Decatur insists upon this paving we would prefer to surrender the franchise for this line rather than be subjected to the expense. I would appreciate it if you would please take it up with the City of Decatur and let me know what their views on the subject may be. In the event they would prefer to have this franchise surrendered I will call a meeting of the Board of Directors of the Company and I am sure they will unanimously and immediately pass the necessary resolutions authorizing the surrender of the franchise.

"Naturally we do not want to do this, but we can't pay for the paving and we would rather surrender the franchise than have this additional burden placed upon us under present conditions. Yours very truly, P. S. Arkwright, President."

The objection made to admission of said evidence by the plaintiff, City of Decatur, was: First, that it is merely an offer to compromise this claim, which is never admissible in evidence. Second, we object to it on the ground that it constitutes no defense to this action, nor any part of any defense to this action.

Movants and each of them contended that said evidence was relevant and material on the question of benefits and as showing that prior to the paving in question the City of

Decatur was put on notice that movants and movants' property would and could receive no benefit from the paving and that prior to the paving in question and the paving assessment in question the plaintiff was put on notice that no benefits would be received by movants or any of movants' property from the paving and that they would be willing to surrender and cease operating under the said franchise in Decatur.

The court sustained the objection of plaintiff and refused [fol. 104] to allow said letter in evidence, holding that under the state of the pleadings and the decision of Judge Thomas overruling the demurrer to the petition, the said letter was not admissible and that the question of benefits or lack of benefits for the paving assessment in question was not relevant nor material.

Movants and each of them say that it was error for the court to exclude said letter and that it was error for the court to hold that the benefits or lack of benefits was irrelevant and immaterial, and error for the court to exclude said letter and not to admit the same together with the other evidence which movants stated they expected to introduce with reference to showing that none of the movants and none of movants' property would or could receive any benefits from the special paving assessments in question.

13. Because the court erred, as movants and each of them contend, in refusing to allow the following letter from P. S. Arkwright, President of the Georgia Power Company, to Mr. L. J. Steele, City Attorney of the City of Decatur, dated July 16, 1925, to wit:

"Dear Mr. Steele:

"It is a little more than I think the people of Decatur ought to expect of us—to furnish electric railway service at a grossly inadequate fare and then have to pave the streets of the town besides. This is certainly not a good thing for us and in the long run I don't think it is a good thing for Decatur. In any event, we can only do what we are able to do and this depends exclusively on the earnings of the street railway. The street railway system as a whole is not earning its way even at the fare of 7 cents allowed in Atlanta. The fare of 5 cents insisted upon by the Town of Decatur is rapidly confiscating the property and runs the losses of the line to Decatur up to such an amount that

there is nothing left with which to pay for street paving. In any event, this company cannot pay for the paving in Decatur, nor can it rebuild or recondition its tracks in connection with the paving.

"Under the circumstances if the City if Decatur insists on paving streets and assessing this company for it I repeat [fol. 105] in all earnestness my suggestion that we surrender the franchises of the street railway in Decatur. If, however, the City of Decatur, refuses to accept this then I don't know what can be done. Certainly we cannot pave the streets, nor pay paving assessment for paving the streets, nor can we do any work on the track in connection with the paving. Yours very truly, P. S. Arkwright, President."

The objection made to admission of said evidence by the plaintiff, City of Decatur, was: First, that it is merely an offer to compromise this claim, which is never admissible in evidence. Second, we object to it on the ground that it constitutes no defense to this action nor any part of any defense to this action.

Movants and each of them contended that said evidence was relevant and material on the question of benefits and as showing that prior to the paving in question the City of Decatur was put on notice that movants and movants' property would and could receive no benefit from the paving and that prior to the paving in question and the paving assessment in question the plaintiff was put on notice that no benefits would be received by movants or any of movants' property from the paving and that they would be willing to surrender and cease operating under the said franchise in Decatur.

The court sustained the objection of plaintiff and refused to allow said letter in evidence, holding that under the state of the pleadings and the decison of Judge Thomas overruling the demurrer to the petition, the said letter was not admissible and that the question of benefits or lack of benefits for the paving assessment in question was not relevant nor material.

Movants and each of them say that it was error for the court to exclude said letter and that it was error for the court to hold that the benefits or lack of benefits was irrele-

vant and immaterial, and error for the court to exclude said letter and not to admit the same together with the other evidence which movants stated they expected to introduce with reference to showing that none of the movants and none of movants' property could or would receive any benefits from the special paving assessment in question.

[fol. 106] 14. Because the court erred, as movants and each of them contended, in refusing to allow in evidence a certified copy of the ruling and holding of the Georgia Public Service Commission on the application of the Georgia Power Company to increase street railway fares in the City of Decatur, to wit:

"On an application of the Georgia Railway & Power Company to increase street car fares on various lines, the Railroad Commission of the State of Georgia on September 22nd, 1920 fixed street railway fares over various lines at 7 cents per passenger. In this order on said date the commission said:

"Prior to April 14, 1919 applicant had in effect on its city and suburban lines, five cents fares with free transfers.

'Effective August 14, 1919, a maximum fare of six cents was authorized where a five cents fare was then charged, except as to fares between Atlanta and Decatur on the Main Decatur line and between Atlanta and College Park on the College Park line fixed by contracts between the Company and the towns of Decatur and College Park, held by the Supreme Court of Georgia to be valid:

'Patrons on these two lines intermediate between Atlanta and Decatur and College Park pay six cents fares * * *.

'The five cent fares now in effect on the Main Decatur and College Park lines, contracted for under vastly different conditions than now exist, are not fairly compensatory, and as to the patrons of the Company on other routes, and on intermediate territory on these routes are discriminatory. The Commission is without power to increase them * * * increased facilities are required on the main Decatur and College Park routes, which will result in improved service * * *. As to the main Decatur and College Park routes, on which trailers shall be used on all schedules operated during rush hours."

The objection made to said evidence was that it was irrelevant and immaterial and not binding on plaintiff.

Movants and each of them contend that said evidence was relevant and material as a part of the evidence being offered by movants to show that movants and movants' [fol. 107] property received and could receive no benefit whatever from the street paving in question and that this evidence was relevant as showing that the street railway fare upon the lines in question by virtue of the franchise under which the line was being operated could not be raised or changed so as to keep the operation of said line from being confiscatory; and that movants and each of them contended at the time of offering said evidence that it was relevant and material on the question of the entire lack of benefits to movants and to the property of movants. Movants and each of them contend that the court erred in refusing to allow the admission of said testimony.

15. Because the court erred, as movants and each of them contend, in refusing to allow the following notice of the City of Decatur with reference to the discontinuance of service, to wit:

"September 26, 1925.

"To the Hon. Mayor and Commissioners, City of Decatur, Ga.

DEAR SIRS:

Enclosed is a formal surrender by Georgia Railway & Electric Company, owner, and Georgia Railway & Power Company, Lessee, of the franchises or permits for the construction and operation of the electric railway within the city limits of Decatur, extending along North Railroad Avenue, Oak Street, Broad Street, East Court Square, South Court Square, and McDonough Street.

"We desire to give notice in advance of the discontinuance of the operation of this electric railway line so as not to discommode the patrons of the line any more than is necessary.

"Accordingly, you are notified that we will discontinue operation of this electric railway line at the end of the regular schedule on September 30th, 1925.

"You are now engaged in paving some of the streets on which this line has been constructed. We suggest the advisability of suspending the paving operation until the

track is taken up as, of course it will be necessary to disturb the paving in order to remove the track.

[fol. 108] "In this connection, we would like also to protest against the work you are doing on this track. We have already protested against the paving. We call your attention also to the fact that you are improperly replacing this track and due to the manner in which you are having this work performed both the track and the paving will very soon go to pieces should cars be operated over it.

"'While we have placed October 1st as the date when operations will be discontinued, still if you are willing let us known and we will discontinue immediately. Yours very truly, P. S. Arkwright, President."

No. 31A.

"To the Hon. Mayor and Commissioners, City of Decatur, Ga.

Dear Sirs:

On or about September 4th, 1899, the Town of Decatur granted the Collins Park and Belt Railroad in the Town of Decatur from the western town limits on North Railroad Avenue to Oak Street, thence along Oak Street to Broad Street, thence along Broad Street to East Court Square, thence along East Court Square to South Court Square, thence along South Court Square to McDonough Street, thence along McDonough Street to North Railroad Avenue, which permit or franchise was transferred subsequently to Georgia Railway & Electric Company. Also, by ordinance adopted by the Mayor and Council of the Town of Decatur on or about March 3, 1903, the said permit or franchise was amended and an additional permit granted to double track a part of said route.

Under the said permits or franchises the said electric railway line has been constructed and operated and is now being operated in the City of Decatur, Georgia, and the same, with its permits and franchises, has been leased to Georgia Railway & Power Company for a term of years.

The said line of electric railway in the City of Decatur is operated at a loss and the revenues derived therefrom do not yield the cost of operating the same or earn enough to pay the taxes on account of the same. Because the rate of fares which may be charged on the said line of electric

railway is unalterably fixed and rightly limited to a sum less than the cost of furnishing such service. It is impos- [fol. 109] sible ever to earn on such electric railway the cost of its operation, and such operation cannot be continued except at a certain and continuing loss.

Consequently, Georgia Railway & Electric Company, as the owner of said permits and franchises, and Georgia Railway & Power Company as the lessee thereof, concurring herein, hereby formally surrender the said permits and franchises granted by the Town and City of Decatur for the construction and operation of the said electric railway hereinbefore referred to.

Attached hereto are certified copies of resolutions adopted by the Board of Directors of Georgia Railway & Electric Company and Georgia Railway & Power Company, authorizing the surrender of such franchises.

Yours very truly, Georgia Railway & Electric Company, by John C. Hollman, Vice President. Georgia Railway & Power Company, by P. S. Arkwright, President."

No. 31B.

"The resolutions adopted by the Board of Directors of Georgia Railway & Electric Company with reference to authorizing the surrender for the street railway franchise and permit therein described, from the Town of Decatur, were submitted to and read to the meeting.

Whereupon, the following resolution was offered and unanimously adopted, to wit:

Whereas, by the consent and with the concurrent- of this company, Georgia Railway & Electric Company, by action of its Board of Directors, has this day authorized the surrender to the Town of Decatur of the permit or franchise to construct and operate an electric street railroad in the Town of Decatur from the western town limits to North Avenue to Oak Street, thence along Oak Street to Broad Street, thence along Broad Street to East Court Square, then along East Court Square to South Court Square, thence along South Court Square to McDonough Street, thence along McDonough Street to North Railroad Avenue, and

[fol. 110] Whereas, on or about March 18, 1912, the said line of electric railway with the said permit or franchise, was leased to this company for a term of years and,

Whereas, the said electric railway is operated at a loss and its revenues do not yield sufficient to pay the actual cost of operation and the rates of fare thereon are unalterably fixed and rigidly limited to a sum so low that it is impossible for said electric railway ever to pay the actual cost of operation:

Therefore be it resolved by the Board of Directors of Georgia Railway & Power Company that it assents to and concurs in the resolution adopted by the Board of Directors of Georgia Railway & Electric Company authorizing the surrender of the said franchise to the City of Decatur and the officers of this company are hereby authorized to join in such surrender on behalf of this company and to discontinue operation of the said electric railway line and to take up and remove the tracks and other structures built under the said permits and franchises.

Be it further resolved that in the event such surrender is made it shall not in any way or manner affect the obligation of this company under the said lease, but the said lease shall remain in full force and effect, except as to the said railway track in the City of Decatur and the franchise therefor.

Be it further resolved that the officers of this company be and there are hereby authorized and directed to do and perform any and all acts and enter into and execute any and all instruments or "writings" necessary or proper in their judgment to carry this resolution into effect.

No. 31C.

Whereas, by ordinance adopted by the Mayor and Council of the Town of Decatur on or about September 4, 1899, a permit or franchise was granted to the Collins Park and Belt Railroad Company to build, electrically equip and operate an electric street railroad in the Town of Decatur, from the Western town limits on North Boulevard Avenue [fol. 111] to Oak Street, thence along Oak Street to Broad Street, thence along Broad Street to East Court Square, thence along East Court Square to South Court Square, thence along South Court Square to McDonough Street, thence along McDonough Street to North Railroad Avenue, the name of said Collins Park and Belt Railroad Company having been subsequently changed to Atlanta Rapid Transit Company, and

Whereas, said Atlanta Rapid Transit Company, on or about March 28, 1902, transferred and conveyed the said

permit or franchise, together with the electric railway built thereunder, to Georgia Railway & Electric Company, and

Whereas, by ordinance adopted by the Mayor and Council of the Town of Decatur on or about March 3, 1903, the said permit or franchise was amended and an additional permit granted to double track as part of said route, and

Whereas, on or about March 18, 1912, the said line of electric railway, with the said permit or franchise, was leased to the Georgia Railway & Power Company for a term of years, and

Whereas, the said electric railway is operated at a loss and its revenues do not yield sufficient to pay the actual cost of operation and the rates of fare thereon are unalterably fixed and rigidly limited to a sum so low that it is impossible for said electric railway ever to pay the actual cost of operation.

Now therefore, be it resolved by the Board of Directors of Georgia Railway and Electric Company (Georgia Railway and Power Company, lessee, concurring herein) that the officers of this company are hereby authorized and empowered to surrender the franchise and permit hereinbefore described in the preamble to this resolution, granted by the Town of Decatur to Collins Park and Belt Railroad Company and the Georgia Railway and Electric Company, and to discontinue operation of the said electric railway and to take up and remove the track and other structure built under the said permits and franchises.

No. 31D.

Be it further resolved that in the event such surrender [fol. 112] is made Georgia Railway and Power Company, lessee, be and it is hereby released, relieved and absolved from continuing to operate the said line of electric railway or maintaining or preserving the said permits and franchises, such act in no way or manner to affect the obligations of Georgia Railway and Power Company under the said lease, but the same to remain in full force and effect except as to the said railway track in the Town of Decatur and the franchise theretofore hereinbefore described.

Be it further resolved that the officers of this company be and they are hereby authorized to do and perform any and all acts and enter into and execute any and all instruments or writing necessary or proper in their judgment to carry this resolution into effect."

Movants and each of them say that each of said papers herein set out were offered separately and as a whole. Upon the offering of said testimony the plaintiff stated in open court that the resolutions could be considered as a resolution passed by the proper corporate officials and corporate bodies and that it was agreed that the resolutions heretofore set out were passed and that the letters were sent, the objection being made to said testimony by the plaintiff that the same was irrelevant and immaterial and upon the further objection that it was offered to compromise and a settlement. The court sustained the said objection and refused to allow said testimony in evidence.

At the time of offering testimony above referred to, it was stated by movants and each of them that the said resolutions were not an offer of compromise but a part of evidence which movant- wished to introduce together with other testimony to show that movants and movants' property received and could receive no benefit from the street railway paving in question and that movants offered and tendered the street railway franchise in question and offered to discontinue the operation of the street railway lines in the City of Decatur and that said testimony was admissible as showing that prior to the paving assessment in question, petitioner, City of Decatur, had notice of the contentions of movants and each of them in this connection movants offered in evidence the refusal of the City of Decatur to accept the surrender of said franchise, the said [fol. 113] refusal offered in evidence being as follows:

"Ordinance of the Town of Decatur refusing the surrender of the franchise of the Georgia Railway and Electric Company and the Georgia Railway & Power Company to wit:

"Whereas, the commissioners of the City of Decatur, on the 28th day of September, 1925, received from John C. Hallman, Vice President of the Georgia Railway & Electric Company, and P. S. Arkwright, President of Georgia Railway & Power Company, notice that said companies tendered to City of Decatur a surrender of the franchise granted by the Town of Decatur to Collins Park and Belt Railroad Company, September 4th, 1899, and also the amendment thereto granted by ordinance on the 3rd day of March 1903; and

"Whereas, it is not to the interest of the City of Decatur at this time, to accept the surrender of said franchises.

"Therefore, be it resolved by the Commissioners of City of Decatur, that the tender made by John C. Hallman, Vice President of Georgia Railway and Electric Company, and P. S. Arkwright, President of Georgia Railway & Power Company, of a surrender of the above-stated franchise, and the amendment, thereto, be not accepted, and the same is not accepted.

"This September 28, 1925."

And movants and each of them say that upon the offer of the ordinance of the City of Decatur refusing the said surrender of the franchise, the plaintiff objected to the same on the ground that said ordinance was irrelevant and immaterial and the court refused to allow said ordinance in evidence over said objection, and movants and each of them say that said refusal to allow said ordinance in evidence was erroneous, it being stated to the court that the said ordinance was a part of the history of the paving assessment in question and that movants expected to show in connection with the same that none of the movants nor any of movants' property received or could receive any special benefit from the paving in question. The court held that the question of special benefits under the pleadings in said [fol. 114] case and under the ruling of Judge Thomas overruling the demurrer to the petition, the question of benefits was irrelevant and immaterial and movants and each of them say that the court erred in so holding and in not admitting said papers, documents and ordinance in evidence.

Movants say that the ordinance of the City of Decatur refusing to accept the surrender of the franchise in question was offered separately and independently from the other papers and that the court refused to allow the same in evidence upon the objection of the plaintiff that it was irrelevant and immaterial.

16. Because the court erred, as movants and each of them contend, in refusing to allow the movants to introduce testimony that the movants and the property of movants received no special benefit from the street paving in question and in refusing to allow movants to introduce testimony to show that no benefits were received by movants or the property

of movants from or by virtue of the paving in question for which the special paving assessment was made.

In this connection movants introduced as a witness, Mr. P. S. Arkwright for movants, and during the trial of said case, movants asked the witness the question whether or not movants or any of them or the property of any of them had received any benefits or any special benefits of any kind or character from the paving in question. The court, on objection of plaintiff, held that said testimony was irrelevant and immaterial and that the question of benefits by virtue of the overruling of the demurrer to the petition by Judge Thomas, made the question of lack of benefits irrelevant and immaterial.

Movants aver that if said witness, P. S. Arkwright, had been permitted to answer the question, he would have answered that the street railway company and the street railway company's property, and movants and movants' property had received no benefit from the street paving in question, and to complete the record, the following is an extract from the testimony of the said witness, P. S. Arkwright, while on the stand and during the trial of said case:

"Q. Just make your answer, Mr. Arkwright, so as to com-[fol. 115] plete the record.

"A. I have been actively engaged in the supervision of the operation of street railway in Atlanta and suburbs for something over thirty years. I am familiar with the street railway business, I suppose. I am acquainted with street railway operations elsewhere. I know the trend in street railway earnings and street railway uses. The pavement in question in Decatur added not one cent to the value of the street railway property at all. On the contrary, it was a detriment to the street railway operations. It makes it more difficult and expensive to maintain the track with the pavement then without it. The street railway does not use the pavement at all. It does not add any additional travel to the street cars. The line to Decatur from Atlanta is about six and a half miles long. The cost of transporting a passenger from Atlanta to Decatur or from Decatur to Atlanta is greater than five cents. The actual out of pocket expense of operating cost and taxes per passenger is greater than five cents.

"Q. Has any property located along any portion of the street that is paved received any benefit from the paving in question?

"A. No, any special benefit, you mean.

"Q. Yes.

"A. No."

Movants and each of them say that said testimony excluded by the court upon the ground that it was irrelevant and immaterial, was material to the issues involved in said case and that it was material to the issues involved in said case whether the defendants or defendants' property received any benefits whatever from the street paving in question, and movants and each of them say that the refusal of the court to allow the witness to testify as above set out was erroneous, and movants say that said testimony was relevant and pertinent and was relevant and pertinent testimony upon the issues as made in said case under the pleadings, and movants and each of them say that the court erred in not admitting said testimony and in refusing to allow the same.

Colquitt, Parker, Troutman & Arkwright, Attorneys for Movants.

[File endorsement omitted.]

[fol. 116] The recitals of fact in the foregoing amended motion for a new trial are approved as correct. The amended motion is allowed and ordered filed as part of the record in said case.

This October 14th, 1933.

G. H. Howard, Judge S. C. A. C.

The within and foregoing motion for a new trial as amended, coming on for a hearing and after consideration, the said motion upon each and every ground is overruled and a new trial is denied. This Oct. 14, 1933.

G. H. Howard, Judge S. C. A. C.

IN SUPERIOR COURT OF FULTON COUNTY

Number 91639

CITY OF DECATUR

vs.

GEORGIA POWER COMPANY, GEORGIA RAILWAY AND POWER COMPANY AND GEORGIA RAILWAY AND ELECTRIC COMPANY

Trial June 20-21, 1933. Judge G. H. Howard, presiding.

Brief of Evidence

APPEARANCES—Filed Oct. 14, 1933

For the Plaintiff; Messrs. Branch & Howard. Messrs. Howell, Heyman & Bolding, Bond Almand, Esq., John Wesley Weeks, Esq.

For the Defendants: Messrs. Colquitt, Parker, Troutman & Arkwright.

OFFERS IN EVIDENCE

The plaintiff offered in evidence, and the same was admitted by the court without objection, "minute books of the City of Decatur, Volume 4, showing a meeting of the Commissioners of the City of Decatur held April 17th, 1925, and the passage of several ordinances"; also containing "the following recitals: The following ordinances were introduced and ordered advertised for hearing on Friday night, May 15th, 1925: First, for the paving of East Ponce de [fol. 117] Leon Avenue from East Court Square east to Sycamore Drive with 6" *B*ibrolithic Concrete or Asphaltic Concrete, except between the tracks of the Georgia Rwy. & Power Company, and for two (2) feet on each side thereof, which is to be paved with granite cubes, set in concrete and cement grouted.' These minutes were certified by J. S. Looney, City Clerk, and he also, as such clerk, certifies that the ordinances referred to were duly passed."

The plaintiff introduced in evidence, and the same was admitted by the court without objection, a book containing "issue of the DeKalb New Era," a paper of general circulation in the City of Decatur and County of DeKalb,

under date of April 23rd, 1925, containing "a notice relating to the introduction of the paving ordinance and reciting that it will be heard by the Commissioners on May 15th," said notice reading as follows:

"SPECIAL NOTICE—OFFER IN EVIDENCE

GEORGIA, DeKalb County:
City of Decatur:

Notice is hereby given that the following ordinances were introduced at the regular meeting of the City Commissioners of the City of Decatur held on Friday night, April 17th, 1925, at the City Hall, in the City of Decatur, Georgia.

For the paving of Atlanta Avenue from West Court Square to West College Avenue with 6" Vibrolithic Concrete.

For the paving of East Ponce de Leon Avenue from East Court Square east to Sycamore Drive with 6" Vibrolithic Concrete or Asphaltic Concrete, except between the tracks of the Georgia Railway and Power Company and for two (2) feet on each side thereof, which is to be paved with granite cubes set in concrete and cement grouted.

For the paving of North Oak Street from East Howard Avenue to East Ponce de Leon Avenue with 6" Vibrolithic Concrete or Asphaltic Concrete, except between the tracks of the Georgia Railway & Power Company, and for two (2) feet on each side thereof, which is to be paved with granite cubes, set in concrete and cement grouted.

For the laying of concrete sidewalk, concrete curbing [fol. 118] and rubble gutter on both sides of Herring Street, from McDonough Street to Atlanta Avenue.

For the laying of concrete curbing on both sides of North Oak St., from East Howard Avenue to Sycamore Street.

For the laying of concrete curbing on the south side of East Ponce de Leon Avenue between Barry and Oak Streets where curbing has not been laid, also for laying concrete curbing on both sides of East Ponce de Leon Avenue (extended) from Glenn Street east to Sycamore Drive.

A hearing will be given the above ordinances at the regular meeting of the City Commissioners, to be held on Friday night, May 15, 1925, at 8 o'clock at the City Hall in the City of Decatur, Ga., and all property owners and those interested therein will be given full opportunity to show

any cause that they may have against the proposed improvements.

This April 22, 1925.

J. S. Looney, City Clerk."

The plaintiff introduced in evidence, and the same were admitted by the court without objection, the minutes of a meeting "held May 15th, 1925, as recorded in the minutes, in which it is recited that a regular meeting of the Commissioners was called and ordered by the Mayor, and then reciting that the following ordinances were adopted," and, under the statement "the following ordinances were adopted, an ordinance reading as follows:

OFFER IN EVIDENCE

"Ordinance of the City of Decatur for paving East Ponce de Leon Avenue as follows:

Whereas, the Commissioners of the City of Decatur, by virtue of the authority granted them under the character of said city, have full power and authority, in their discretion, to grade, pave, macadamize, or otherwise improve the travel, and drainage of the streets, squares, public alleys and lanes of said City; and

Whereas, it is necessary for the public travel and drainage of said streets, that the same should be improved; and [fol. 119] Whereas, it is the judgment of the Commissioners of said City, and by this ordinance they do declare, that the pavement of said streets with 5" Asphaltic Concrete, and with granite cubes between the tracks of the street car company and for two (2) feet on each side thereof, and that granite cubes and ties of the car track be firmly set in a concrete base and the cubes grouted with asphaltic or cement, according to the specifications and plans of the City Engineer will properly improve said streets for the travel and drainage thereof, and that such improvements are necessary for such travel and drainage; and

Whereas, the Commissioners of the said City are authorized under the charter of said City, to assess the cost, in full, for the paving between the tracks and for two (2) feet on each side thereof of the Street Railway Company, and to assess the remaining cost of said paving against the real estate abutting on such street; one half of such remaining cost to be assessed against the real estate abutting on

one side of said streets, and one-half of said remaining cost to be assessed against the real estate abutting on the other side of said streets, where paved.

Therefore be it ordained by the Commissioners of the City of Decatur and it is hereby ordained by authority of the same, that North Oak Street from East Howard Avenue to East Ponce de Leon Avenue and East Ponce de Leon Avenue from East Court Square to Sycamore Drive be improved by paving the same with 5" Asphaltic Concrete and with granite cubes between the tracks of the Street Railway Company, and for two (2) feet on each side thereof, and that the granite cubes and ties of the car track be firmly set in a concrete base and the cubes grouted with asphalt or cement.

Be it further ordained, that when said street has been so improved, the City Manager of said City, shall make up an assessment roll of the cost of such improvement, showing the total cost thereof and showing the total cost between the tracks of said Railway Company and for two (2) feet on each side thereof, and showing the remaining cost of such improvement; that is, the cost after deducting from the total cost the cost of the paving of said tracks and for [fol. 120] two (2) feet on each side thereof, and showing the number of feet of real estate abutting on each side of said streets, where paved, and the cost per lineal foot on each side of said streets, where paved, as provided by the charter of said City.

Be it further ordained, when the City Manager shall furnish to the Commissioners such assessment roll, they shall adopt an ordinance making an assessment against the Georgia Railway & Power Company for the total cost of the pavement between the tracks of said Company and for two (2) feet on each side thereof; against the real estate abutting on each side of said streets, and against the owners thereof at the time of making said assessment; such remaining cost.

Be it further ordained, that such assessment be a lien against said street railway company and against said property from the time of making said assessment, in terms of the charter of said City.

Be it further ordained, that upon adoption of said ordinance making said assessment, the Clerk of the Commissioners shall notify the respective owners of such property,

and the Georgia Railway & Power Company, the amount of the assessment against their said properties, and he shall give them ten (10) days in which to make payment thereof and after ten (10) days he shall issue fi. fas. against the property, and the said owners thereof and against the Georgia Railway & Power Company for all assessments which may be in default, as provided by the charter of said City, which fi. fas. shall be turned over to the Marshal of said City for levy and sale, if not paid.

Be it further ordained, that said Clerk shall publish notices of the introduction of this ordinance notifying the public and parties interested by publication in DeKalb New Era, one time, at least ten (10)days before the adoption of this ordinance, and such notice shall contain a statement of the street to be improved, the kind of pavement to be made; the date of the meeting of the Commisioners at which such ordinance will be considered for adoption, and the same may be adopted at such meeting or some subsequent meeting, in the discretion of the Commissioners, and any person interested in such improvement may file his objection to the adoption of such ordinance with the [fol. 121] City Clerk and be heard by said Commissioners, if he may desire to appear and be heard.

Be it further ordained, that all ordinances or parts of ordinances in conflict herewith be, and the same are hereby repealed."

The plaintiff introduced in evidence, and the same was admitted by the court without objection, "statement from the minutes of the City of Decatur relating to a meeting of the Commissioners on May 21st, 1926, reciting that the assessing ordinance, attached to the plaintiff's petition was duly enacted at that meeting, the same being as follows:

OFFER IN EVIDENCE

"Whereas, the Commissioners of the City of Decatur by ordinance adopted May 15, 1925, provided for paving East Ponce de Leon Avenue, from East Court Square to Sycamore Drive, in the City of Decatur; and

Whereas, said ordinance provided for the cost of paving between the tracks of the Georgia Railway & Power Company, and for two (2) feet on each side thereof be assessed against the Georgia Railway & Power Company, and provided, that one-half of the remaining cost for paving said

Avenue be assessed against the real estate abutting on the north side of said Avenue, and that the other one-half of said remaining cost be assessed against the real estate abutting on the south side of said Avenue; and

Whereas, said East Ponce de Leon Avenue has been paved by the City of Decatur in accordance with said ordinance, adopted on May 15th, 1925; and

Whereas, the total cost of paving said avenue, according to the assessment roll of the City Manager, is $42,242.07 and

Whereas, the cost of paving between the tracks of the Georgia Railway & Power Company and/or two (2) feet on each side thereof is, $13,444.66; and

Whereas, one-half of the remaining cost of paving said avenue, is $14,397.70; and

Whereas, there are 369992 feet of real estate abutting on the north side of said avenue, and 3699 feet of real estate abutting on the south side of said avenue; and

Whereas, the cost per lineal foot be assessed against the [fol. 122] real estate abutting on the north side of said avenue is $3.89-1/2 per foot; and

Whereas, the cost per lineal foot be assessed against the real estate abutting on the south side of said avenue, is $3.89-1/2 per lineal foot.

Therefore be it ordained by the Commissioners of the City of Decatur, and it is hereby ordained by authority of the same that for the paving of said Ponce de Leon Avenue between East Court Square and Sycamore Drive, the sum of $13,444.66 is hereby levied and assessed against the Georgia Railway and Power Company; and against the property of said Company, the same being the cost of paving between tracks of said Company and for two (2) feet on each side thereof, as said tracks run in and along said Avenue.

Be it further ordained by the authority aforesaid, that the sum of $3.89-1/2 per lineal foot is hereby levied and assessed against the real estate abutting on the North side of Ponce de Leon Avenue from East Court Square to Sycamore Drive, for the paving of said Avenue, the same amounting to the sum of $14,397.70, and for one-half of said remaining cost for the paving of said avenue.

Be it further ordained by the authority aforesaid, that the sum of $3.89-1/2 per lineal foot is hereby levied and

assessed against the real estate abutting on the south side of Ponce de Leon Avenue from East Court Square to Sycamore Drive, for the paving of said Avenue the same amounting to the sum of $14,397.70, for one-half of said remaining cost for the paving of said avenue.

Be it further ordained, that the City Clerk shall give notice to the Georgia Railway & Power Company the amount of the assessment made against said Company for the paving of said street; and give them ten (10) days in which to make payment thereof.

Be it further ordained, that the City Clerk shall give the owners of the real estate abutting on said Avenue between East Court Square and Sycamore Drive the amount of the assessment against their respective properties, and give them ten (10) days in which to make payment thereof.

[fol. 123] Be it further ordained, that after the expiration of said ten (10) days, the City Clerk shall issue an execution against the Georgia Railway & Power Company for the cost of paving between its tracks and for two (2) feet on each side thereof, if said company shall be in default in making payment of said assessment, and shall likewise issue executions against the respective parcels of real estate abutting on said Avenue between East Court Square and Sycamore Drive, and against the owners thereof, if such owners are in default after said ten (10) days, and shall turn all such exceptions over to the Marshal of said City who shall proceed to make collections thereof by levy and sale, as provided by the charter of the City of Decatur.

Be it further ordained, that all ordinances and parts of ordinances in conflict herewith be and the same are hereby repealed."

Plaintiff introduced in evidence, and the same was admitted by the court, a nulla bona as follows:

OFFER IN EVIDENCE

"Georgia,
DeKalb County:

Due and legal search made and no property of the Georgia Railway & Power Company and/or Georgia Power Company and/or Georgia Railway & Electric Company was found in the City of Decatur, *was found* upon which the

within execution could be levied or which is subject to levy and sale under this execution.

This the 2nd day of November, 1931.

G. S. Swords, Marshal."

STIPULATION

With reference to the property levied on on the 6th day of July, 1927, by M. E. Goodger, Marshal of the City of Decatur, the entry of which levy is set out in paragraph 12 of the plaintiff's petition, it is agreed that the substation never became the property of the Georgia Railway and Power Company or came into its possession except in so far as it may have done so under and by virtue of a lease between the Georgia Railway and Electric Company and Georgia Railway and Power Company, the provisions of which are set out in the plaintiff's petition. That the said property is not on or adjacent to any street being paved under the assess- [fol. 124] ment ordinance. That said property or substation is among the property specified in said lease and covered thereby. It is further agreed that said property or sub-station is across the Georgia Railway about a half mile from the street being paved under the paving assessment ordinance in question.

Plaintiff offered in evidence "notice of street improvement and the bill for the improvement, headed City of Decatur, Georgia, to Georgia Railway and Power Company, stating that this notice was served the 19th day of June, 1926, which it is admitted was mailed or served on that date on the Georgia Railway and Power Company, said notice being as follows:

OFFER IN EVIDENCE

"City of Decatur, Georgia

To: Georgia Railway & Power Company, Atlanta, Georgia.

Notice served, this the 19th day of June, 1926.
$13,444.66

——, City Clerk.

Street Improvement Collectors' Office

Decatur, Georgia, June 19th, 1926.

Your are hereby notified that your bill for street improvement on East Ponce de Leon Avenue, in Decatur, Georgia,

as specified below, is now due, but you are entitled to 10 days notice within which to pay the same to City of Decatur, before it is turned over to the Marshal for collection.

For paving between your tracks and for two (2) feet on each side thereon on East Ponce de Leon Avenue, from East Court Square to Oak Street, $13,444.66."

Plaintiff "put in evidence by agreement the following:

Stipulation

It is stipulated and agreed that the street railway line along East Ponce de Leon Avenue and along the street paved under the paving ordinance and assessment ordinance in question was the property of and belonged to the Georgia [fol. 125] Railway and Electric Company. The Street railway line was owned by the Georgia Railway and Electric Company at the time of the assessment and paving in question and that said property was acquired by the Georgia Power Company under and by virtue of the consolidation of the Georgia Railway and Power Company into the Georgia Power Company under the joint agreement and certificate of incorporation of February 25th, 1927. That said line of the Georgia Railway and Electric Company on, along and upon Ponce de Leon Avenue was being operated by the Georgia Railway and Power Company under and by virtue of the lease of January 1, 1912, at the time of the assessment ordinance and paving of the street in question and whatever possession the Georgia Railway & Power Company had of said street railway line and tracks was under and by virtue of said lease. That the said street railway line was part of the property described in the said lease. It is further stipulated that the Georgia Power Company was in possession of the property levied upon at the time of the levy as set out in paragraph 12 of the petition by virtue of the consolidation of the Georgia Railway & Electric Company and other companies into the Georgia Power Company. The Georgia Railway & Electric Company owned Street Railway lines through various streets in the City of Atlanta and from the City of Atlanta to the City of Decatur, and through the City of Decatur, over which electric street cars were operated; that this property was covered by the lease to the Georgia Railway & Power Company from the Georgia Railway & Electric Company. That the tracks in the City of Decatur run along East Ponce de Leon Avenue

and known as the North Decatur line. Said North Decatur line operated over various tracks belonging to the Georgia Railway & Electric Company and is part of the property covered by the said lease. The Georgia Railway & Power Company operated cars from the center of the City of Atlanta to the City of Decatur and into the City of Decatur and around a loop in the City of Decatur and over East Ponce de Leon Avenue in Decatur and over Hurt Street and along Edgewood Avenue into the City of Atlanta, and operated cars over the same and over other lines and tracks of the street car company and operated by the street car company in Atlanta. At the time the paving was done and at the [fo' .26] time of the consolidation of the Georgia Railway & Electric Company and the Georgia Railway & Power Company and other companies into the Georgia Power Company, the Georgia Railway & Electric Company and the Georgia Railway & Power Company were amply solvent.

The ..ntiff introduced in evidence, and the same was admitted by the court, annual return for taxation as follows:

OFFER IN EVIDENCE

Annual Return for Taxation

On the Georgia Railway & Power Company, Lessee, Georgia Railway & Electric Company Street Railroad Company of all property owned by said Company on the January 1, 1925, made to the Comptroller-General by the President, in pursuance with law, without deducting the indebtedness of said company.

Cities or towns	Main and side track miles	Value	Value of real estate	Trolley wires and poles and electric overhead and underground construction & steam heat & gas mains	Value of track and real estate etc.	Value of franchise	Pro rata value personal property	Aggregate value in County
Decatur.....	6.2	81,471	4,500	36,311	122,282	100,699	32,948	255,929

STATE OF GEORGIA,
County of Fulton:

Before me personally appeared P. S. Arkwright, President Georgia Railway & Power Co., Lessee, President of said Company, who, being duly sworn, deposeth and saith that the foregoing statement contains, by items, a true and correct return of all the property owned, controlled, or held by or on behalf of said Company therein named, without deducting indebtedness of same on the January 1, 1925, and that the value thereof as stated is its full market value.

(Signed) P. S. Arkwright, President of Georgia Railway & Power Company, Lessee.

Sworn to and subscribed before me, this 28th day of April, 1925. (Signed) B. T. Simpson, Notary Public, Fulton County, Georgia. My commission expires Sept. 5, 1926.

[fol. 127] Annual Return for Taxation

On the GeorgiaRailway and Power Company, Lessee, Georgia Railway & Electric Company, Street Railroad Company of all property owned by said company on the Jan. 1, 1926, made to the Comptroller-General by the President, in pursuance with law, without deducting the indebtedness of said Company.

Cities or towns	Main & side track miles	Value	Value of real estate	Trolley wires and poles and electric overhead and underground construction & steam heat & gas mains	Value of track and real estate, etc.	Value of franchise	Pro rata value personal property	Aggregate value in County
Decatur.....	6,267.	81,471	4,500	39,311	125,282	103,067	34,604	262,953

STATE OF GEORGIA,
County of Fulton:

Before me personally appeared P. S. Arkwright, Georgia Railway & Power Company, Lessee, President of said Company, who, being duly sworn deposeth and saith that the foregoing statement contains, by items, a true and correct return of all the property owned, controlled or held by or on behalf of said company, therein named, without deducting indebtedness of same on the Jan. 1, 1926, and that the value thereof as stated is its full market value.

(Signed) P. S. Arkwright, President of Georgia Railway & Power Company, Lessee.

Sworn to and subscribed before me, this 7th day of July, 1926. (Signed) B. F. Simpson, Notary Public, Fulton County, Georgia. My commission expires Sept. 5, 1926.

(The Plaintiff rests.)

[fol. 128] The defendant tendered the following stipulation of facts, and the same was admitted in evidence:

STIPULATION

The street railway line in Decatur on East Ponce de Leon Avenue was built by the Collins Park & Belt Railroad Company and its name was subsequently changed to Atlanta Rapid Transit Company and this line was subsequently conveyed by deed from Atlanta Rapid Transit Company to the Georgia Railway & Electric Company.

The original grant from the City of Decatur to the Collins Park and Belt Railroad Company for construction of the line as follows:

"Atlanta, Ga., August 26th, 1899.

To the Honorable Mayor and General Council of the City of Decatur, Georgia:

The Collins Park and Belt railroad Company respectfully petitions your Honorable body to grant to it the right and franchise to construct, electrically equip and operate the following lines of street car tracks over and upon the following streets of the City of Decatur:

Commencing at the City Limits of Decatur Street, i. e. the street running along the north side of the Georgia Rail-

road and extending along said street east as far as Candler Street or the next street east of and parallel to Candler Street; thence along Candler Street or said next street east of and parallel to Candler Street to Sycamore Street; thence west along Sycamore Street to McDonough Street; thence along McDonough Street to a connection with said line petitioned for on Decatur Street or road, with the right to make such sidings and turnouts as may be necessary, and petitioners will ever pray.

Collins Park and Belt Railroad Company, By C. J. Simmons, President.

September 4th, 1899.

The following ordinance was read by councilman Patillo, to wit:

Be it ordained, that from and after the passage of this ordinance, that Franchises be granted the Collins Park & Belt Railroad Company, to build, electrically equip and operate an electric street railroad in the Town of Decatur from the western limits on North Railroad Avenue to Oak Street; [fol. 129] thence along Oak Street to Broad Street; thence along Broad Street to East Court Square; thence along East Court Street or Square to South Court Street or Square thence along South Court or Square to McDonough Street; thence along McDonough Street, to North Railroad Avenue, or to leave North Railroad Avenue at McDonough Street; thence direct along McDonough Street to Court Square; thence east along South Court Square to East Court Square; thence North along East Court Square to Broad Street, or to build, electrically equip and operate an electric street railroad on any of the above named streets. Wherever this route runs along streets already occupied by the track of the Atlanta Railway Company the said track shall be removed and replaced by the Collins Park & Belt Railroad Company and at the latters expense so that the tracks of the two companies shall be as nearly as possible equally distinct from the sidewalks except at corners.

The tracks of the Collins Park and Belt Railroad Company shall be laid on the south side of Broad Street and west side of McDonough Street from the tracks of the Atlanta Railway Company. The streets shall be left in as good condition except for the tracks as before the tracks were laid, and the tearing up and replacing the streets shall be done under the supervision of the Street Committee. The Town

of Decatur reserves the right to regulate the speed of cars and the right to make all such regulations as pertain to police power of Decatur. All overhead and other construction shall be done in a reasonably safe manner and the street committee shall see to this, and all matters pertaining to grades shall be subject to the approval of the street committee.

This is the line in question in this suit.

By deed dated March 28th, 1902, the Atlanta Rapid Transit Company conveyed all of its property, together with its different lines of railway to the Georgia Railway & Electric Company."

STIPULATION.

It is stipulated that the only property owned by the Georgia Power Company in Decatur not devoted to some public utility service as a stock of goods in a store in Decatur, which stock of goods, consisting of merchandise, is [fol. 130] of the value of approximately $2500.00.

It is agreed that the same provisions are contained in the joint agreement of 1930 as were contained in the original one of 1927 so far as set out in the plaintiff's petition. In 1927 a consolidated corporation took in the Georgia Railway & Power Company, Georgia Railway and Electric Company, and various other companies. Subsequently another Georgia Power Company took in the Macon Company. The certificate of incorporation by the Secretary of State was dated June 26th, 1930. The present defendant, Georgia Power Company, is a corporation under the certificate of incorporation of June 26th, 1930. The Georgia Railway and Power Company and Georgia Railway and Electric Company are constituent companies of a former Georgia Power Company. They were constituent companies of the first consolidation of February 25th, 1927. They are not constituent companies of the present Georgia Power Company except in so far as the former Georgia Power Company became a constituent of the present Georgia Power Company. The original Georgia Power Company is a constituent company of the second Georgia Power Company and the second Georgia Company is a constituent of the present corporation Georgia Power Company.

Preston S. Arkwright, a witness for the defendant, having been duly sworn testified on cross-examination as follows:

We run an electric light and power business and run some bus service in Decatur. We do not have any bus property located in Decatur, except the buses run through there. The stock of goods that I spoke of consists of lamps, stoves, refrigerators, things like that. The goods that are there now were not goods that were obtained through the Georgia Railway & Power Company. The store was opened, I think, around 1918, or prior to that time. It was owned and operated by the Georgia Railway & Power Company when it was opened. It does not own the store but the stock of goods. The stock of goods is sold generally to the public like any merchandise. As to whether or not I can say that any part of the stock that was there in 1918 is there now—if I said anything about it, I would say that none of it was there in 1918. I think it has been sold or possibly thrown [fol. 131] away or junked. I would say that none of it that is there now was there in 1925 or 1926. I mean the store now is the store of the Georgia Power Company.

It does not own the building. It is the local office of the company in Decatur. The stock is owned now by the Georgia Power Company. Since February, 1927, it has been owned by the Georgia Power Company.

The present Georgia Power Company was incorporated June 26, 1930; The Georgia Railway and Electric Company was incorporated in 1902, and the Georgia Railway & Power Company was incorporated in 1911.

[File endorsement omitted.]

Order Approving Brief of Evidence

The foregoing is approved as a true and correct brief of the evidence in the foregoing stated case, and is ordered filed as a part of the record in said case. Oct. 14th, 1933.

G. H. Howard, Judge, S. C. A. C.

In Superior Court of Fulton County

Verdict

We, the jury, find the issues in favor of the plaintiff and that the plaintiff is entitled to collect the amount of $13,444.66 with interest thereon from June 21, 1926, at the rate of 7% per annum represented by the fi fa. set out in the

petition and that the plaintiff is entitled to a decree against Georgia Power Co. and Georgia Railway and Power Co. for the collection of said amounts.

This June 31, 1933.

W. C. Bennet, Foreman.

IN SUPERIOR COURT OF FULTON COUNTY

No. 91,639

CITY OF DECATUR

vs.

GEORGIA POWER COMPANY ET AL.

DECREE—Filed June 26, 1933

The order on the demurrers passed by Judge Thomas in this case to the effect that the plaintiffs would be entitled to a general judgment against the defendants and a decree so moulded as to give the plaintiff a lien by general judgment for said assessment on any property of the defendant wherever located; and after hearing all the evidence [fol. 132] it appearing that the allegations have been established and there being no evidence to the contrary, by direction of the court the jury have found the following verdict:

"We the jury find the issues in favor of the plaintiff, and that the plaintiff is entitled to collect the amount of $13,444.66 with interest thereon from June 21, 1926 at the rate of 7% per annum represented by the fi. fa. set out in the petition and that the plaintiff is entitled to a decree against Georgia Power Company and Georgia Railway & Power Company for the collection of said amounts.

W. C. Bennett, Foreman."

June 21, 1933.

It is therefore considered, ordered and decreed by the court that the issues are hereby decreed in favor of the plaintiff, and that the Georgia Railway & Power Company and the Georgia Power Company are liable to the plaintiff in the amount of the fi. fa. set out in plaintiff's petition,

together with legal interest thereon from the date of same, and that the plaintiff do have and recover of the Georgia Railway & Power Company and the Georgia Power Company the sum of $13,444.66, with interest thereon from June 21, 1926, at the rate of seven (7%) per cent. per annum, to wit: $6,587.84 as interest and — costs of court.

This the 26th day of June, 1913.

G. H. Howard, Judge, Superior Court, Atlanta Circuit.

[File endorsement omitted.]

[fol. 133] Clerk's certificate to foregoing transcript omitted in printing.

[File endorsement omitted.]

[fol. 134] IN SUPREME COURT OF GEORGIA

No. 10,029

Decided September 18, 1934

GEORGIA POWER COMPANY ET AL.

v.

CITY OF DECATUR

OPINION

By the Court:

1. The City of Decatur was authorized under its charter, in the discretion of its commissioners, to pave any street in the city, and to assess the cost of the paving of that portion of the street between the tracks and for two feet on each side thereof against a street railway company and its property having and using a track along the street. Under the city charter the amount of such assessment was a blanket lien against such railway company and its property from the time of the ordinance making the assessment. The city was authorized to issue execution against such street rail-

way company and its property for the amount of the assessment to be levied by the city marshal:

2. A lessee holding under a 999-year lease with the right to both possession and rights of the property, with exclusive right to operate same, may be properly treated as the owner of the property.

3. The power of determining benefits from local improvements to the property is a legislative one, and will not be inquired into by the courts unless it is made to appear that the discretion is arbitrarily abused by the authority making the improvement.

4. When paving is done and assessment therefor regularly made in the manner provided in the city charter, a presumption arises that the paving and assessment were legal, and casts the burden of proof on one who attacks the assessment on the ground that the same was an arbitrary abuse of the legislative authority, because of no benefit, or that it is confiscatory. A street railway company that is under contract to maintain and operate a street railway in the city cannot, without the consent of the city, avoid the payment of a paving assessment duly made by the city by tendering the city its street-railway lines, property, and franchise.

[fol. 135] 5. The acts of the General Assembly (Ga. L. 1919, p. 934, and Ga. L. 1924, p. 534) giving the city the authority, and the ordinance of the city thereunder, providing for the pavement of the street on which were located the tracks in use by the street railway company, and requiring the street-railway company to pay for the portion of the paving between and on two feet of each side of its tracks, were not, for any reason assigned, in violation of the 14th amendment to the constitution of the United States, or of article 1, section 1, paragraph 3, of the constitution of the State of Georgia, embodying the due-process and equal-protection clauses of the constitution of the United States and of Georgia; or of article 1, section 3, paragraph 1, of the constitution of Georgia, against the taking of private property for public use without adequate compensation; or of article 7, section 2, paragraph 7, of the constitution of Georgia, which provides a uniform system of taxation.

6. An execution although regularly issued by a city for paving assessment, unless the power be so granted by the

General Assembly, cannot be lawfully levied on the property of a street railway company that is being used by the company as part of its system in rendering service to the public.

7. When a street-railway company is liable for a paving assessment, and subsequently, without payment of the assessment, merges into a new company under an agreement that the new company assumes and agrees to pay all assessments against the old company and its property; and in the merger the old company transfers to the new company all of its property including the street railway property and franchises that is subject to the lien of the assessment, which new company accepts and appropriates the same to its own use, the acquiring company takes the property impressed with the lien for the payment of the assessment. On failure to pay, the city may in an equitable proceeding, recover from the new company the amount of the assessment with interest. An equitable proceeding under such circumstances would not be prohibited by article 1, section [fol. 136] 1, paragraph 23 of the constitution of Georgia providing that the legislative, judicial, and executive powers shall forever remain separate and distinct.

8. A suit in equity brought by the city on November 17, 1931, to enforce its lien and collection for the paving assessment represented by an execution regularly issued therefor on June 21, 1926, was not barred by the statute of limitations.

9. The demurrers were properly overruled. The verdict was demanded, and no error appeared requiring the grant of a new trial.

Judges Graham, McLaughlin, and Hawkins were designated for this case instead of disqualified Justices of the Supreme Court.

The City of Decatur, on November 17, 1931, brought suit in Fulton superior court against the Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company, seeking to recover a personal judgment against each of said defendants for a paving assessment assessed against the Georgia Railway & Power Company, for which an execution was issued by the clerk of the City of Decatur on June 21, 1926, against the property

of the Georgia Railway & Power Company. The petition, in so far as is material to an understanding of this case, alleged as follows: The Georgia Power Company is a consolidated corporation chartered by the Secretary of State in 1927 under the laws of the State of Georgia, and particularly under the Civil Code, §§ 2607 et seq., and is composed of certain constituent corporations, among others the Georgia Railway & Power Company and the Georgia Railway & Electric Company. The Georgia Railway & Electric Company formerly owned and operated a street car system in the City of Atlanta, Fulton County, and in the City of Decatur, DeKalb County, and as a part of said system operated lines between Atlanta and Decatur and other points near Atlanta. On January 6, 1912, the Georgia Railway & Electric Company, by contract, conveyed and leased to Georgia Railway & Power Company, for the term of 999 years, all of its property of every kind, consisting of its street-car system, franchises, and all real and personal property. The lease among other things, provided: "The lessor [fol. 137] doth hereby grant, demise, and lease unto the lessee all and singular its railroads, electric-power and steam-heating plants and systems, lands, franchises, contracts, and other property of every description, real and personal, now owned or hereafter to be acquired by the lessor, and all its franchises, rights, privileges, easements, permits, licenses, and appurtenances thereunto belonging or otherwise, including the right to demand and receive to the lessee's own use all tolls, rents, revenues, income, and profits. • • • The lessee covenants that it will pay, satisfy and discharge, as the same shall become due and payable, all taxes, rates, charges, licenses, and assessments, general and special, ordinary and extraordinary, of every nature and description, which have been or may be lawfully imposed or assessed during the continuance of this lease in any way upon the lessor or upon the lessee." That part of the property conveyed by the lease to the Georgia Railway & Power Company was a street-car line and franchises in the City of Decatur, located partly on what is known as East Ponce de Leon Avenue.

The charter of the City of Decatur authorized the commissioners of the city, in their discretion, to grade, pave, macadamize, or otherwise improve for travel and drainage

the streets, squares, public alleys and lanes of the city. On May 15, 1925, the commissioners of the city, by ordinance duly passed under authority of the city charter, ordained that said street should be paved, that such improvement was necessary for travel and drainage, and that the cost of such pavement be assessed in full against the street railway company for paving between the tracts and for two feet on each side thereof, and that the remaining cost of said paving be assessed, one half against the real estate abutting on one side of the street where paved, and the other half against the real estate abutting on the other side; and that such assessment be a lien against said street railway company and against said property and the owners thereof from the time of making said assessment. On May 21, 1926, an ordinance was passed by the commissioners of the city, find-[fol. 138] ing that said paving had been completed under the ordinance adopted on May 15, 1925, and that the cost of paving between the tracks of the Georgia Railway & Power Company and for two feet on each side thereof was $13,-444.66, and that the clerk of said city should give notice to the Georgia Railway & Power Company of the amount of such assessment and ten days in which to make payment thereof and that after the expiration of ten days, on failure to pay such assessment, the clerk should issue an execution against the company for that amount, and make collection thereof by levy and sale as provided by the charter of the city. During all of the period of time just shown, the Georgia Railway & Power Company was in possession of all of the property, rights, and franchises of the Georgia Railway & Electric Company by virtue of the 999-year lease. The Georgia Railway & Power Company failed to pay said assessment, and a fi. fa. was issued by the clerk of the city on June 21, 1926, directed to the marshal of the city, against the Georgia Railway & Power Company for $13,444.66, the amount of the assessment. On July 6, 1927, the fi. fa. was levied by the marshal on part of the property conveyed to the Georgia Railway & Power Company by the Georgia Railway & Electric Company under the 999-year lease, on which property was located what is known as a substation used by the defendant in connection with the operation of its street car and electric-light systems in and around the City of Decatur, but was not located on the street that was paved. The Georgia Power Company filed a statutory claim, and subsequently filed a bill in equity in aid thereof.

It claimed title by virtue of the consolidation agreement under which it was organized and chartered. It also claimed that the property was not subject to levy and sale, by reason of the fact that it was a necessary part of the property used by it in connection with its duties as a quasi public-service corporation.

By the consolidation agreement and the charter under which the defendant Georgia Power Company was organized it was provided: (11) "Upon the making and perfecting of this joint agreement and the filing of the same in the office [fol. 139] of the Secretary of State, and upon the issuance by the Secretary of State of his certificate that the provisions of Sections 2607, 2608, and 2609 of the Code of Georgia of 1910 have been complied with, the consolidated corporation shall thenceforth constitute a corporation by the name provided in this joint agreement. Then and thereafter the consolidated corporation shall be possessed of all the rights, privileges, powers, and franchises as well of a public as of a private nature, and be subject to all the duties, liabilities, debts, and obligations of each of the constituent corporations participating in this joint agreement, and thereupon the corporate franchises, entity, and existence of the constituent corporations shall pass to and be consolidated into the consolidated corporation, and the consolidated corporation shall be fully vested therewith, and the corporate existence of the constituent corporations shall cease except as consolidated into the consolidated corporation, or as may be requisite for carrying out the purposes of this joint agreement or as continued by statute." (12) "Upon the taking effect of this joint agreement, all and singular the rights, privileges, and franchises of each of the constituent corporations, and all property, real, personal and mixed, and all debts due on whatever account, as well for stock subscriptions and all other things in action of or belonging to each of the constituent corporations, shall be and hereby are granted, conveyed, assigned, transferred, and vested in the consolidated corporation, its successors and assigns, without further act or deed; and all rights, properties, privileges, and franchises and all and every other interest shall be thereafter as effectually the property of the consolidated corporation as they were of the constituent corporations; and the title to any of the real estate vested in the constituent corporations, whether by deed or otherwise, shall not revert or be in any way impaired by reason of this joint agreement

or of the consolidation of the constituent corporations into the consolidated corporation; provided, that the rights of creditors and all liens upon the property of the constituent corporations shall be preserved unimpaired, but limited in lien to the property affected by such liens at the time this [fol. 140] joint agreement shall become effective, and the constituent corporations may be deemed to continue in existence in order to preserve the same; and all debts, liabilities and duties of the constituent corporations shall thenceforth attach to the consolidated corporation and may be enforced against it to the same extent as if said debts, liabilities, and duties had been incurred or contracted by it."

Trial of the claim case resulted in a verdict and judgment in favor of the city, which was reversed by the Supreme Court (see citations in the opinion, infra.)

The petitioner (the city) "shows that under the law it cannot levy upon the tracks of the street car line located in the City of Decatur, for the reason that these tracks constitute a part of the main line of the street-car system operated by the defendants to and through the City of Decatur; * * * that the defendants have no property located in the City of Decatur which is subject to levy and sale, because of the fact that all such property is used in connection with the business of the defendants as a quasi public-service corporation. Petitioner is therefore without any legal remedy for the enforcement of said assessment and fi. fa. and the collection of the amount due to it by the defendants as herein set out. * * * The defendant, Georgia Power Company, the consolidated corporation, is under the legal duty and obligation to pay said assessment, but as hereinbefore set out it fails and refuses to pay the same. * * * Petitioner being legally entitled to collect said assessment and defendant being under the obligation to pay the same, but petitioner being without any legal means or remedy to enforce the payment of the same, it is compelled to seek the aid of a court of equity." It prays "that the court, by its proper decree in this cause, decree that the plaintiff is entitled to the collection of the amount due to it as aforesaid, that is, the amount of said assessment, together with legal interest thereon since the same was due; and that the court further decree that the defendants are under the legal duty and obligation to pay the same; and that judgment be rendered against said defendants for the amount of said indebtedness; and that a

[fol. 141] decree be molded so as to provide that the plaintiff is entitled to collect the same out of any property of the defendant that may be found subject to levy and sale; and petitioner prays that such other and further relief be granted to it as may be necessary to the end that the defendants be required and compelled to pay the plaintiff and the plaintiff be enabled to recover and collect of the defendants the amount due to the plaintiff as set forth in this petition."

Each of the defendants demurred to the petition, and moved to dismiss the action, on the following grounds: (1) Said petition does not set out sufficient facts to entitle the plaintiff to the relief sought against this defendant. (2) Under the rules and principles of law, the plaintiff is not entitled to the relief sought in the case at bar. (3) Under the facts and the principles of law governing special paving assessments, petitioner is not entitled to a personal judgment against this defendant or to make this defendant personally liable for the paving assessment in question, and is not entitled to have a general judgment against this defendant. (4) There is no statute or charter provision of the City of Decatur authorizing petitioner to make this defendant personally liable for the paving assessment in question. (5) There are no statutes or charter powers of the City of Decatur giving the city the right to maintain said suit against this defendant, or giving petitioner the right to recover a personal judgment against this defendant on account of any special paving assessment. (6) If any of the statutes of the State or any charter provision of the city be held as giving petitioner the right to impose a personal liability upon this defendant for any special paving assessment sought to be made against this defendant, defendant says that such statute or charter provision, as thus construed, would be unconstitutional and violative of article 7, section 2, paragraph 1 (Code, § 6553), which provides that all taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed, * * * and shall be levied *under* general laws; and that to impose a personal liability on this defendant for the cost of special paving im-[fol. 142] provements would violate said constitutional provision for equality and uniformity of taxation. (7) Under the law of the State, special paving assessments are imposed on property, and assessments for paving of streets have been sustained by the Supreme Court only be-

cause of benefit to particular property; and under such construction of the law, executions issued therefor do not run generally against the owner of the property; and the instant suit is not authorized, for it would be in contravention of the rules of law governing special paving assessments, and to allow a personal general judgment under the facts in this case would be to abandon the theory of specific benefits, which is the only basis upon which special paving assessments can be made under the laws of this State. (8) There is no law of the State entitling plaintiff to collect the special paving assessment fi. fa. in question by a suit in equity undertaking to obtain a general personal judgment against the defendant. (9) If by the proceedings in this case, seeking to enforce the fi. fa. in question, the plaintiff is claiming to act under and by virtue of the act of the legislature (Ga. L. 1919, p. 834 et seq., and Ga. L. 1924, p. 534), these being amendments to the charter of the plaintiff, said acts do not give the plaintiff the right to collect said fi. fa. by suit or to obtain a personal judgment against this defendant.

Defendant further says that if said act be so construed as to permit a personal liability or personal judgment against this defendant, then said act would be illegal, void, and violative of the constitution article 7, section 2, paragraph 1 (Code § 6553), for that it will permit the plaintiff to recover a personal judgment against this defendant for a special paving assessment, and will permit the plaintiff to make a special paving assessment a personal liability upon this defendant, and such construction would be violative of the State and Federal constitutions, in that it would deny to this defendant the right to equality and uniformity of taxation, for that special paving assessments under the laws of Georgia cannot be made a personal liability on the owner of the property benefited, and to permit such assessment to be made a personal liability against this defendant [fol. 143] would deprive it of the equal protection of law as guaranteed to it by the 14th amendment to the constitution of the United States. Defendant says that if said acts of 1919 and 1924 are construed as permitting a recovery of a personal judgment or liability against this defendant for the assessment in question, such construction would render said acts and the ordinances passed thereunder violative of the Georgia constitutional provisions as set out in the

Code, §§ 6358, 6359, and would also violate the 14th amendment of the constitution of the United States, for that said construction would deprive said defendant of the equal protection of the law as therein provided, and would discriminate against this defendant, and would deprive this defendant of its property without due process of law.

Defendant moved to dismiss the suit, on the following grounds:

(1) The petition does not allege that defendant received any benefit from the paving assessment; the assessment is not based or predicated on any claim of benefits; and the assessment and the ordinance are illegal and invalid, for that (there being no contention or allegation with reference to benefits) they confiscate the property of the defendant and deny it due process of law and equal protection of law as guaranteed by the 14th amendment to the constitution of the United States. (2) All other paving assessments, under the ordinance and under the laws of the State, are based and predicated on claimed benefits; and to base such assessment against other property on the claim of benefits, and the assessment against this defendant without any claim or contention or claim of benefits, would deny to defendant equal protection of law as guaranteed to it by the 14th amendment to the constitution of the United States, and would render said assessment illegal and invalid. (3) Under the laws of the State, a special paving assessment against property is not a personal liability against the owner of such property and can only be enforced against the property benefited; and to construe the charter amendment of the City of Decatur as holding that no personal liability can be rendered against the owners of other property, but to hold that a personal liability can be enforced against this defendant, would render said statute uncon- [fol. 144] stitutional, for that it would deprive this defendant of equal protection of the law as guaranteed by the 14th amendment to the constitution of the United States; for the statute, as thus construed, would render an entirely different remedy against this defendant for the collection of a special paving assessment than is allowed against all other property owners.

The defendants filed answers to said petition. Each of them set out in substance the following allegations: The plaintiff had no right under any charter power to bring

this suit. The statute under which the paving was done and the assessment made did not give any power or authority to the city to obtain a general personal judgment against each of said defendants. Prior to the paving assessment the plaintiff was notified that the property of defendants would and could receive no benefit from the paving. The assessment as contemplated would vastly exceed the entire value of the street railway lines located and being operated within the territorial limits of the City of Decatur, taking into consideration all improvements which in any way resulted or could result from the street paved. The defendant offered to the City of Decatur all its street railway property and lines operated within the territorial limits of the city, together with the franchise under which they were constructed and operated, without the necessity of any levy or sale. Under said continuing tender there was no necessity to levy on the street-railway tracks located in the city, together with the franchise to operate them, and under said continuing tender the plaintiff cannot claim that it could not legally levy on said tracks and franchise. The only reason why the plaintiff would not accept the entire street railway lines within the city, together with the franchise, in payment of the special paving assessment in question, is because their entire value is less than the amount of the assessment. Under the laws of the State of Georgia, assessments for local improvements and paving assessments are referable to and are an exercise of the taxing power. They do not fall under the class of taxation referred to in the constitution (Code, § 6553), but under the [fol. 145] laws of the State special paving assessments can only be sustained on the basis of benefits to particular property affected thereby, and such special paving assessments are and can be imposed only upon property benefited, and execution therefor can not be made a personal liability against the property owner and no action to recover a general personal judgment can be sustained. The paving for which the assessment in question was made did not, does not, and cannot benefit the portion of the street-railway lines, property, or franchise, located within the territorial limits of Decatur. The paving did not add anything to the physical property or franchise of the defendants. The paving was a detriment to the physical property of the defendants, and did not add anything to the tracks. The entire street railway lines including the franchise,

were not and are not worth the amount of the assessment in question. This suit is an undertaking by the city to recover a personal judgment against each of said defendants for the assessment in question, although neither of the defendants nor their property received any benefit or improvement from the paving. The acts of the legislature, properly construed, do not permit any such action or personal liability or judgment to be obtained as is attempted in this suit. Defendants further contend as shown by their demurrer and motion to dismiss (supra), and say that if the acts of the legislature be construed as conclusively establishing benefits and as depriving defendants of the right to show that neither they nor their property received any benefits from the paving in question, then said acts and ordinances would deprive defendants of the due process of law as guaranteed to them by the 14th amendment to the constitution of the United States and by the constitutional provisions of the State (Code, §§ 6358, 6359); for as thus construed said statutes and the ordinance passed thereunder prevent the defendants from having a hearing on the question of benefits as compared to the paving assessment.

It was further pleaded that this suit could not be maintained, for the reason that the statutory method as set out in the city charter is exclusive, and neither a court of equity nor a court of law can enlarge or extend the method as therein provided for; that this suit is not in accordance [fol. 146] with the method provided in said charter with reference to the method or means of collecting the paving assessment; that under the constitution (Code, § 6379) the legislative, judicial, and executive powers are separate and distinct, and the courts cannot legislate a method or remedy for collecting said assessment different from that provided by the legislature, as set out in the charter of the city, and that charter does not give the plaintiff any right to the method pursued in this case and does not give the right to institute either a suit at law or a suit in equity and to obtain a general money judgment for the amount of the assessment in question. It was further pleaded that if this suit be construed as for the purpose of collecting a special paving assessment and obtaining a general judgment against each of said defendants, it is barred by the statute of limitations.

The court overruled the demurrer. The trial resulted in a directed verdict in favor of the City of Decatur against the Georgia Railway & Power Company and the Georgia Power Company, for the amount of the paving assessment, $13,499.66, with interest from June 21, 1926. A motion for new trial was overruled. The case is for review on exceptions to that ruling, as well as to the overruling of the demurrer.

GRAHAM, J.

The writer feels very much as former Chief Justice Bleckley uniquely expressed himself in the case of Wells v. Savannah, 87 Ga. 397 (13 S. E. 442): "Some cases task the anxious diligence of a court, not by their difficulty but their simplicity. This is one of them. Because the case seemed too plain for controversy, we have had some apprehension that we might decide it incorrectly. Impressed always by the ability and learning, the wide research and earnest advocacy of the distinguished counsel for the plaintiffs, we have experienced a vague dread that we might stumble over legal obstacles which, if they exist, a treacherous darkness conceals. In order to examine the ground thoroughly, we have held up the case for months, read authorities cited and not cited, perused books before unknown to us, deliberated, meditated, considered and recon- [fol. 147] sidered. But to the last hour we have discovered nothing debatable in the controlling question raised for our decision, fringed though it certainly is with technical niceties of great delicacy and much interest. To which side the artificial logic of these niceties would incline the scale is immaterial; for the solid practical subject of taxation must be dealt with on broader principles. The value of property consists in its use, and he who owns the use forever, though it be on conditions subsequent, is the true owner of the property for the time being." The case at bar presents very few questions that have not already been determined by the courts. Most of the issues now before us on the paving assessment involved were raised and decided in Georgia Power Co. v. Decatur, 168 Ga. 705 (149 S. E. 32), and 170 Ga. 699 (154 S. E. 268). The case reported in 170 Ga. 699, came on writ of error after directed verdict finding certain property of the Georgia Power Company subject to a levy for the assessment, and on refusal of new trial. It was held that a personal judgment could

not be rendered against the claimant in favor of the plaintiff on a statutory claim. It was then held by a majority of the court as follows:

"1. The General Assembly by virtue of the acts approved August 18, 1919, and August 12, 1924 (Ga. L. 1919, p. 934; 1924, p. 534), amending the charter of the City of Decatur, conferred full power and authority upon said city, in the discretion of its commissioners, to pave any street therein, and, when street railway tracks are located in a street ordered paved, to assess the cost of paving that portion of the street between and for two feet on each side of said tracks against the company owning the tracks and its property in said municipality, used in the operation of its street railway system therein.

"2. The power of determining the benefits to be received by the property of the street railway company from local improvements is a legislative one; and in this case, by virtue of the charter of the City of Decatur, this authority was vested solely in the commissioners of said city, who in the exercise of said authority have determined the same; and the question of benefits to the company's property will not be inquired into by the courts unless it is made to ap- [fol. 148] pear that there has been an arbitrary abuse of such authority. The evidence in this case establishes no such abuse. The charter of said city as amended creates a binding lien upon all the property of the street railway company located within said municipality and used in the operation of its street railway therein, for the amount of the cost of paving said area occupied by its tracks and for two feet on either side thereof, located in the street, which lien under the facts in this case is subject to judicial enforcement.

"3. The legislative acts cited, amending the charter of the City of Decatur, are not in violation of any of the specified provisions of either the constitution of the United States or the constitution of the State of Georgia.

"4. The cost of paving that portion of East Ponce de Leon Avenue in said municipality lying between and for two feet on either side of the street railway tracks located therein being a lawful assessment against the Georgia Railway and Electric Company, the owner of said tracks, and

enforceable against the property of said company used by it in the operation of its street railway system, the Georgia Railway and Power Company became, by virtue of the express terms of its lease of the franchise and property of said Georgia Railway and Electric Company, executed prior to the levying of the paving assessment in question, liable for the payment thereof; and the Georgia Power Company having subsequently to said lease, become an incorporated consolidated corporation under the provisions of sections 2607, 2608, and 2609 of the Civil Code, composed of the Georgia Railway and Electric Company, the Georgia Railway and Power Company, and other constituent corporations, by virtue of a consolidation agreement filed with the Secretary of State, whereby it became liable for the payment of the amount of said paving assessment so levied, said assessment may be recovered in an appropriate action brought by the City of Decatur against the Georgia Power Company."

The opinion discussed at length the questions not hereinafter mentioned; and the same is now approved as the [fol. 149] law of this case. The issues discussed and decided therein were: The General Assembly of this State has the power to authorize a municipality therein to pave its streets, and to assess and enforce the cost and collection of a special assessment against a street-railway company for the cost of paving the area occupied by its tracks and for a reasonable distance outside of its tracks located in a street ordered paved under such legislative authority; and the City of Decatur was duly authorized to do the paving and assess the cost, as was done in this case, against the Georgia Railway and Power Company. The power of determining the benefits to be received by the property of the railway company from local improvements is a legislative one; and in this case, by virtue of its charter as amended, this authority is vested solely in the city commissioners, who in the exercise of said authority determined the same; and the question of benefits by virtue of said improvement to the property of the railway company will not be inquired into by the courts, unless it is made to appear that there has been an arbitrary abuse of such authority. The burden is upon the appellant who attacks the exercise of such authority in ordering the improvement to establish the fact that the same was abused, and the proof must be

sufficient to show that the city authorities abused their discretion in making the pavement and assessing the cost against the street railway company. The legislative act and the ordinance enacted by the City of Decatur, authorizing the pavement and the assessment, are not unconstitutional or in violation, for any reason assigned, of the due-process and equal-protection clauses of the fourteenth amendment to the constitution of the United States and as embodied in the constitution of Georgia, or in violation of paragraph 1 of section 3 of article 1 of the constitution of Georgia against the taking of private property for public use without paying adequate compensation therefor, or in violation of paragraph 1 of section 2, of article 7 of the constitution of Georgia, which provides a uniform system of taxation for the general support of the government. The assessment is a blanket lien against the property of the street-railway company, and a segment of the railway prop- [fol. 150] erty or any portion thereof used in carrying on its business with the public could not be sold to satisfy the assessment, but in lieu thereof the court has power to render a personal judgment therefor against the street railway company, to be collected as other judgments. The Georgia Power Company was, under its merger and consolidation agreement with the Georgia Railway and Power Company, liable to the City of Decatur for the assessment in question, which in an appropriate action therefor, could be recovered by the City.

1. The City of Decatur was given legislative authority to pave the street and assess the cost of the paving. The action of the city in accordance with its charter so authorizing is presumed to be legal, and not an arbitrary abuse of its discretion. This presumption may be overcome, but the burden to set the same aside rests with the defendants who attacked it. Of course, if the assessment was not legal, the Georgia Power Company, notwithstanding its merger and agreement thereunder to pay the assessment, would not be liable for the same. The only ground now urged against the legality of the assessment that has not already been made by the Georgia Power Company, and decided adversely to it by this court, is that the assessment should, if legal, have been against the lessor, Georgia Railway and Electric Company, and not against the lessee, Georgia Railway and Power Company. The act authorizing the paving

assessment provided, in reference to street railroad companies, "and any street railroad company, or other railroad company having a track or tracks running along or across the streets, alleys, lanes, squares, or public places of said city, where so improved, shall be required to pay the actual cost in full of grading, regrading, paving, repaving, building, rebuilding, and otherwise improving or reimproving such street, alley, lane, square, or public place between their tracks and for two (2) feet on each side thereof, and in such cases and on such streets, alleys, lanes, squares, or public places where such assessments are made against such street railroad company or other railroad company"; and further provided, "and the amount of the assessment for such improvement against said street railroad company [fol. 151] or other railroad company and against the property thereof shall be a lien against such railroad company and against the property thereof, dating from the time of the passage of the ordinance making the assessment."

2. At the time of the paving and assessment by the City of Decatur the Georgia Railway and Power Company was operating the street railway, using the street on which the pavement in question was made, under a lease from the Georgia Railway and Electric Company, the owner, for a period of 999 years. Subsequently these companies were merged and consolidated into the Georgia Power Company, wherein the Georgia Power Company expressly bound itself to pay all obligations and assessments of these companies. The agreement upon consolidation constituted a merger, and not a sale. The Georgia Power Company, by reason of the merger, became liable for the payment of all unpaid legal assessments of the acquired corporations. Code, § 2227; A., B. & A. Railroad Co. v. A. C. L. Railroad Co., 138 Ga. 353 (75 S. E. 468). The City of Decatur treated the lessee as the owner, and thereupon made the assessment for the cost of the paving against the Georgia Railway and Power Company as the owner. While the assessment could have been made against the lessor, it was proper to make it against the lessee. The lessee held and was operating the street railway, using the streets of the city, under a 999-year lease, by the terms of which it agreed to pay all assessments, present, past and future, of the lessor. By the very terms of the lease, if the assessment was legal, the lessee was liable for its payment, and was also liable

as owner of the property. A lease of the character under consideration is the practical equivalent of a sale of the property. A lessee for over a hundred years, that has the right to both the possession and rights of the property and the exclusive right to operate the same, has an interest in the property. Wright v. Central of Ga. Ry. Co., 146 Ga. 406 (91 S. E. 471). A lease for 999 years may be considered as a perpetual lease, and the lessee be treated as the owner. Piper v. Town of Meredith, 83 N. H. 107 (139 Atl. 294, 55 A. L. R. 148); Penick v. Atkinson, 139 Ga. 649 (77 S. E. 1055, 46 L. R. A. (N.S.) 284, Ann. Cas. 1914B, 842); Wells v. Savannah, supra, s. c. 181 U. S. 531 (21 Sup. Ct. 697, 45 L. ed. 986). So we conclude that the city properly treated [fol. 152] the lessee as the owner of the property, and that the assessment was not illegal because of not having been made against its lessor.

3-5. The plaintiffs in error further contend that the paving and assessment was an arbitrary abuse of the legislative authority, and that the street railway company received no benefit from the paving and assessment. There arises, from the legislative act of the city in adopting the ordinance for the paving and making the assessment, a presumption that the paving was beneficial to the street railway company, and that the assessment was legal. The burden of overcoming this presumption that the action of the city was not an arbitrary abuse of the legislative authority rests upon the plaintiffs in error. To rebut this presumption they offered to surrender and tendered to the city their street railway franchise and property. If they were permitted, under their rate contract with the city, to defeat the paving assessment by an offer to surrender their franchises and property thereunder, they did not go far enough to do so. They did not show that the street railway franchise and property thereunder was the whole franchise and property held and operated in connection with its street railway and power business in the city. They failed to show that they were not also operating, in connection with the street railway business, an electric light and power business in the city, and that such franchise and property was not acquired by the Georgia Power Company in the merger. To the contrary, it may be gathered from the admissions in the pleadings, the evidence, and the argument in the case, as well as from the contract of merger, that the Georgia

Railway and Power Company at the time of the paving assessment was operating in the city, in connection with its street railway, and electric light and power business which was acquired by the Georgia Power Company in the merger, and which the Georgia Power Company did not offer to surrender. It may be fairly stated that the defendants offered to split or separate its street railway franchise and property from its electric light and power business franchise and property, and to surrender one branch [fol. 153] of its service, the street railway branch, which it contended was unprofitable on account of the 5-cent rate contract made with the city, in settlement of the assessment, and at the same time hold to the other branch of the service, its electric light and power franchises and property thereunder, that may be profitable. The city authorities in causing the paving and making the assessment may well have considered in determining the benefits to be derived therefrom, the value of the whole property, and not merely the value of one branch of the service. Under the consolidation agreement wherein the Georgia Railway and Electric Company and the Georgia Railway and Power Company were merged into the Georgia Power Company, all franchises originally granted to the separate companies were consolidated and merged into one franchise; and without the consent of the city the Georgia Power Company could not split its street railway franchise from its electric light and power franchise, surrender the street railway franchise and property thereunder, and at the same time retain its electric light and power franchise. Georgia Power Co. v. Rome, 172 Ga. 14 (157 S. E. 283). The offer of the defendants did not go far enough. They only offered to surrender one branch of the service. The evidence is also insufficient to overcome the legal presumption in favor of the assessment. Durham Public Service Co. v. Durham, 261 U. S. 149. Moreover, to permit the surrender of the street railway property and franchise would allow the plaintiffs in error to do that which has heretofore been prohibited by the courts on account of the 5-cent rate contract with the City of Decatur. The contract has been upheld by both this court and the Supreme Court of the United States. Georgia Railway & Power Co. v. Decatur, 152 Ga. 143 (108 S. E. 615), s. c. 262 U. S. 432 (43 Sup. Ct. 613, 74 L. Ed. 999). When the ordinance for the pavement

was adopted under which the assessment was made, the Georgia Railway and Electric Company and the Georgia Railway and Power Company, its lessee, concurring therein, offered to surrender the street railway property and remove from the streets. The city refused to accept that offer, and brought an action enjoining the companies from removing their street railway tracks and from abandoning the street railway business in the city. The injunction [fol. 154] was granted, and an appeal was taken therefrom to this court. The Georgia Power Company after the merger was made a party to this case. The question of no benefit, that the paving assessment was confiscatory, the offer to surrender and abandon the property—in fact, the questions now raised on the legality of the assessment—were made in that case and in Georgia Railway & Power Co. v. Decatur, just cited, and were decided adversely to the contention of the railway companies. Georgia Railway & Power Co. v. Decatur, 168 Ga. 705, (supra). The Supreme Court of the United States, on review, affirmed that decision and held that on account of the 5-cent fare contract the refusal of the city to accept surrender of the street railway franchise did not operate to deprive the street railway company of its property without due process of law, that the rate-fare contract was still in force, and that the losses attributable to the stretch of track in question and the 5-cent fare are immaterial while the rate contract continues. Georgia Power Company v. Decatur, 262 U. S. 432 (supra). So it may be easily seen that in the well-beaten paths of the plaintiffs in error to the courts the questions they now make have been decided against them, that under these decisions and the peculiar facts of the case they have failed to carry the burden of showing that the action of the city authorities in causing the pavement and making the assessment therefor was an arbitrary abuse of their discretion.

6. The paving assessment was authorized and made as provided for in the city charter, and execution in the manner provided for by the statute was issued for the assessment. All of this was regular. The execution for the assessment was a blanket lien against the property of the Georgia Railway and Power Company. Acts 1924, p. 534; 29 Ga. App. 653 (116 S. E. 645). The defendant in execution by

its merger transferred to that company all of its property which was subject to the lien of the city for the assessment. The Georgia Power Company accepted the property so impressed with such lien, and is using it in the operation of its street railway, light, and power service to the public. The property can not be lawfully seized and sold under the exe- [fol. 155] cution to satisfy the assessment. Georgia Power Co. v. Decatur, 173 Ga. 219 (159 S. E. 863). There is no dispute that the assessment is due, that it has been made and fixed as provided for by statute; but it cannot be levied, nor can it be collected in an action at law. State v. Western & Atlantic Railroad Company, 136 Ga. 619 (71 S. E. 1055).

7-9. The amount of the assessment is due the City of Deactur. It has a lien for same, represented by the execution legally issued for the assessment, which execution is not barred by the statute of limitations. This court held, in its majority opinion when the case was before it on the claim (170 Ga. 699, supra), that the Georgia Power Company is liable for the assessment as evidenced by the lien therefor, which may be enforced by appropriate legal proceedings. The city is authorized to sue in its corporate name. It could not levy its execution, and could not sue at law. An appropriate remedy left it was a suit in equity to enforce its lien against the Georgia Power Company, the company that in the merger appropriated the property of the defendant in execution that was subject to the lien. The suit in equity by the city was authorized. Citizens & Southern Bank v. State, 151 Ga. 696 (108 S. E. 161); Alabama Traction Co. v. Selma Trust &c. Bank, 213 Ala. 269 (104 So. 517). See also Smith v. Kingsley, 178 Ga. 681 (173 S. E. 702). The city was also entitled to recover interest on the assessment at the rate of seven per centum per annum from the date of the issuance of the execution. Bacon v. Savannah, 105 Ga. 62 (31 S. E. 127).

The action is not prohibited by art. 1, sec. 1, par. 23, of the constitution of the State, which provides that the legislative, judicial, and executive powers shall forever remain separate and distinct.

In the motion for new trial the plaintiffs in error complained of the admission and exclusion of certain evidence. If all the evidence admitted over objection had been excluded, and all the evidence excluded over objection had been admitted, the same would not have changed the status

of the case, but would have been immaterial to its consideration. Wherefore it may be seen that the overruling of the motion to dismiss and the demurrer was proper; that if [fol. 156] any error was committed on the admission or rejection of evidence, the same was harmless; and that the direction of the verdict complained of was in conformity to the law and the facts of the case.

Judgment affirmed. Beck, P. J., Gilbert and Bell, JJ., and McLaughlin and Hawkins, JJ., concur.

[fol. 157] IN SUPREME COURT OF GEORGIA

JUDGMENT—September 18, 1934

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

GEORGIA POWER CO. ET AL.

v.

CITY OF DECATUR

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Beck, P. J., Gilbert and Bell, JJ., and Graham, McLaughlin and Hawkins, JJ., concur.

[fol. 158] IN SUPREME COURT OF GEORGIA

[Title omitted]

PETITION FOR APPEAL—Filed Nov. 8, 1934

Petition for Appeal from the Supreme Court of the State of Georgia to the Supreme Court of the United States.

To the Honorable Marcus W. Beck, Presiding Judge of the Supreme Court of the State of Georgia (the Hon. Richard B. Russell, Chief Justice of said Court, being disqualified):

Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, your petitioners, respectfully show:

1. Petitioners were plaintiffs in error in the above stated case and are appellants in this petition for appeal.

2. The above named City of Decatur was defendant in error in the above stated case and is the appellee, in this petition for appeal.

3. The above named appellee filed a complaint in the Superior Court of Fulton County, State of Georgia, on November 17, 1931, in which suit they sought to recover a personal judgment against the Georgia Railway & Power Company, Georgia Railway & Electric Company and the Georgia Power Company for a special improvement paving assessment against the Georgia Railway & Power Com- [fol. 159] pany. The petition alleged that the Georgia Power Company was a consolidated corporation, chartered by the Secretary of the State of Georgia in 1927, under the laws of the State of Georgia, and particularly under Sections 2607 et seq. of the 1926 Code of the State of Georgia; and is composed of certain constituent corporations, among them being the Georgia Railway & Power Company and Georgia Railway & Electric Company.

Said special improvement paving assessment was made under and by virtue of legislative acts of the State of Georgia giving the City of Decatur the right to improve and reimprove its streets and make assessments for such improvements and reimprovements against property owners and street railway companies. (Ga. Laws 1919, pp. 934 et seq. and Ga. Laws 1924, pp. 534 et seq.) Each of the appellants demurred to the petition and moved to dismiss it upon the grounds that the petition of appellee did not set out sufficient facts to entitle the City of Decatur to the relief sought; that it (the City of Decatur) was not entitled to a personal judgment against appellants; and upon the further ground that if said statutes be so construed as to entitle the City of Decatur to the relief sought and to a recovery against appellants in the case at bar, that then said statutes would deprive appellants of the equal protection of the law and of the due process of law, and confiscate appellants' property in contravention of the

Fourteenth Amendment of the Constitution of the United States, and would be invalid and unconstitutional.

Appellants filed an Answer to the petition brought by the City of Decatur raising the federal and constitutional questions similar to those raised in its demurrer to the petition, and setting out therein that neither appellants nor their property had received any benefits from the special [fol. 160] paving improvement for which the assessment had been made and which forms the basis of the present action.

The motion to dismiss the petition and the demurrer were overruled, and timely exceptions were taken to the said decision.

The case proceeded to trial and the trial court excluded all of the evidence offered by appellants showing an entire absence of benefits to appellants and appellants' property from the paving improvement for which the assessment was made. After the exclusion of all of the evidence tendered and offered by appellants, a verdict and judgment was directed in favor of the appellee, in the sum of $13,444.66 together with interest from the 21st day of June, 1926.

The various questions raised by the demurrer and the answer, as to the constitutionality of said acts, were duly taken to the Supreme Court of the State of Georgia. There was likewise taken to said Court for review the rulings of the trial court holding that as to street railway companies and appellants, testimony showing an entire absence of benefits from the paving improvement, was irrelevant and immaterial.

The appeal from the various judgments, rulings and decrees of the Superior Court of Fulton County were carried to the Supreme Court of the State of Georgia, (the highest Court of said State (and the judgment, rulings and decision of the lower court were affirmed by the said Supreme Court of the State of Georgia on the 18th day of September, 1934.

4. In said cause there was drawn in question the validity of the legislative acts of the State of Georgia, giving appellee, the City of Decatur, the right to improve and reimprove its streets and make assessments for such improvements and reimprovements against street railway [fol. 161] companies and appellants (and other property

owners)" (Ga. Laws 1919, pp. 934 et seq. and Ga. Laws 1924, pp. 534 et seq.), on the ground that said statute as construed and enforced against appellants was repugnant to the Fourteenth Amendment of the Constitution of the United States in that it deprived appellants of the equal protection of the law and the due process of law, and confiscates appellants' property in contravention of said constitutional amendment. The decision of the Supreme Court of the State of Georgia was in favor of the validity and constitutionality of said Act.

Petitioners further represent that the judgment and decision of the Supreme Court of the State of Georgia was erroneous in sustaining the decision and rulings and judgment of the trial court and was erroneous in holding that said legislative acts, as construed and enforced against appellants, were valid and constitutional and not in violation of the equal protection and due process of law provisions of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, petitioners pray for the allowance of an appeal from said decision of the Supreme Court of the State of Georgia, (the highest Court of said State) to the Supreme Court of the United States, in order that the decision of the Supreme Court of the State of Georgia may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the clerk of the Supreme Court of the State of Georgia, may be sent to the Supreme Court of the United States, as provided by law.

Petitioners, desiring the appeal to be a supersedeas, prays an order touching the security to be required of them, and the approval of such bond as required in this case.

[fol. 162] The errors upon which your petitioners claim to be entitled to an appeal are those above indicated, and more fully set out in the assignment of errors filed herewith.

This 8th day of November, 1934.

Walter T. Colquitt, Colquitt, Parker, Troutman & Arkwright, Attorneys for Petitioners and Proposed Appellants.

[File endorsement omitted.]

[fol. 163] IN SUPREME COURT OF GEORGIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Nov. 8, 1934

The said Georgia Railway & Electric Company, Georgia Railway and Power Company, and Georgia Power Company, appellants, assign the following errors in the record and proceedings in said case:

1. The Supreme Court of the State of Georgia (the highest Court of said State) erred in holding that the legislative acts of the State of Georgia, giving the City of Decatur the right to improve and reimprove its streets and make assessments for such improvements and reimprovements against street railway companies (Ga. Laws 1919, pp. 934 et seq. and Ga. Laws 1924, pp. 534 et seq.), amending and adding to the charter powers of the City of Decatur, and giving it the right to improve and reimprove its streets and make assessments against street railway companies and the property thereof, were valid, legal and constitutional acts.

In said suit there was drawn in question the validity and constitutionality of said acts and statutes of the State of Georgia on the ground that they were repugnant to the equal protection and the due process of law provisions of the Fourteenth Amendment to the Constitution of the United States, and on the ground that they, as construed and enforced by the State Court, confiscated appellants' property in violation of the Fourteenth Amendment to the [fol. 164] Constitution of the United States. The decision of the Supreme Court of the State of Georgia was in favor of the validity of said statutes, which decision is hereby assigned as error.

2. In said suit there was drawn in question the validity and constitutionality of the said statutes of the State of Georgia (Ga. Laws 1919, pp. 934 et seq. and Ga. Laws 1924, pp. 534 et seq.) on the ground that said statutes were repugnant to the Fourteenth Amendment of the Constitution of the United States in that they denied to appellants and each of them the equal protection of the law and the due process of law as therein guaranteed, and confiscated the property of appellants in contravention of said Federal

Constitutional Amendment. The decision of the Supreme Court of the State of Georgia was in favor of the validity and constitutionality of said statutes, which decision is hereby assigned as error.

In Georgia, by virtue of the provisions of the State Constitution, requiring uniformity of taxation, as embodied in Civil Code of Georgia, 1910, Section 6553, the Supreme Court of Georgia holds that all improvement assessments and the statutes under which they are levied must be based upon and are sustained only to the extent that special benefits accrue to the particular property affected.

Appellants say that the aforesaid special improvement statutes of the State of Georgia, as construed and enforced by the Supreme Court of Georgia, against appellants in the case at bar, denied to appellants the equal protection of the law and the due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and resulted in the confiscation of appellants' property in contravention of said constitutional provisions, upon each of the following grounds:

[fol. 165] (a) As against all other parties (owners of property), the assessments made under said legislative acts must be based upon special benefits accruing to the particular property affected thereby. As against street railway companies and appellants in the instant suit, the paving assessment need not be based upon special benefits accruing to particular property affected thereby.

(b) Under said legislative acts as construed and enforced against all other parties, improvement assessments (and executions therefor) are in rem and not in personam and are enforceable solely against the particular property specially benefitted. As against street railway companies and appellants, the improvement assessment, (and executions therefor) are in personam—a blanket lien against the street railway companies and appellants and also against all of their properties—and are not confined to particular property benefitted.

(c) As against all other parties, such assessments cannot exceed the special benefits accruing to the particular property specially benefitted thereby, but as against street railway companies and appellants, such assessments can exceed not only the special benefits resulting to the particular

property affected thereby, but also all special benefits whatever resulting to the property owner.

(d) As against all other parties, such assessments are confined to the real property specially benefitted and cannot be based upon general benefits to other property, but as against street railway companies and appellants, said assessments are not confined to real property specially benefitted but can be and are based upon all property of any kind or character.

(e) As against all other parties, such assessments are confined to real property and cannot be enforced against personal as well as real property, but as against street rail- [fol. 166] way companies and appellants, such assessments are not to be confined to real property but can be based upon personal property, as well.

(f) As against all other parties, the legislative presumption of benefits in the case of assessments levied under said statutes and the municipal ordinances enacted thereunder are rebutted and a prima facie case of confiscation is established by proof that the entire value of the particular property specially benefitted is required to pay the assessment, but as against street railway companies and appellants, the said presumption of benefits is not rebutted and a prima facie case of confiscation is not established by such proof.

(g) As against all other parties, evidence showing the entire absence of special benefits conclusively rebuts the legislative presumption of benefits as embodied in said statutes and the municipal ordinances enacted thereunder, and establishes unconstitutional confiscation of property; but as against street railway companies and appellants, the legislative presumption of benefits are conclusive and not rebuttable, the Georgia Supreme Court, in passing upon the question of benefits from local improvements in the case at bar, held that documentary and oral evidence and testimony offered by appellants showing and proving that appellants and appellants' property had received no benefit whatever from the paving improvement in question was irrelevant and immaterial, and that such evidence, if admitted, (although uncontradicted) "would not have changed the status of the case but would have been immaterial to its consideration."

3. The Supreme Court of the State of Georgia erred in holding that the demurrers (or motions to dismiss the petition) filed by appellants to the petition brought by the City of Decatur against appellants were properly overruled.

[fol. 167] (a) In said demurrers there was drawn in question the validity and constitutionality of the said statutes of the State of Georgia, (Ga. Laws 1919, pp. 934 et seq. and Ga. Laws 1924, pp. 534 et seq.) on the ground that they were repugnant to the 14th Amendment to the Constitution of the United States, in that they denied to Appellants the equal protection of the law and the due process of law therein guaranteed and in that the construction and enforcement of said statutes under said decision confiscated appellants' property in contravention of said constitutional provisions. The judgment overruling the demurrers filed by appellants was in favor of the validity and constitutionality of said statutes, which decision is hereby assigned as error.

(b) In passing upon said demurrers the Supreme Court of the State of Georgia construed and enforced said statutes as making said legislative enactment and municipal ordinances passed thereunder absolutely conclusive against street railway companies and appellants on the question of benefits from the improvement or reimprovement of streets; and denied to street railway companies and appellants any judicial hearing, trial or adjudication with reference to the question of benefits resulting from street improvements made under said statutes.

4. The Supreme Court of the State of Georgia erred in holding that the trial court properly excluded any and all testimony and evidence offered and tendered by appellants which would show or establish the fact that appellants and appellants' property had received no benefits from the street paving improvement in question; and erred in holding that if said evidence "excluded over objection had been admitted, the same would not have changed the status of the case but would have been immaterial to its consideration."

[fol. 168] Said decision of the Supreme Court of Georgia was erroneous in that it denied appellants the right to introduce evidence showing and establishing an entire ab-

sence of benefits from the street improvement in question, and denied to them any judicial investigation or determination of the question of benefits or the entire absence of benefits, and thus denied appellants the due process of law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of the State of Georgia erred in holding: "The question of no benefit, that the paving assessment was confiscatory, the offer to surrender and abandon the property—*in fact the question now raised on the legality of the assessment*—were made in that case and in the case of Georgia Railway and Power Company v. Decatur, 152 Ga. 143; 262 U. S. 432, and were decided adversely to the contention of the railway companies. (Georgia Railway and Power Company v. City of Decatur, 168 Ga. 705.) The Supreme Court of the United States, on review of this case, affirmed it. (Georgia Power Co. v. City of Decatur, 74 U. S. Law Edition 999, 281 U. S. 505.) So it may be easily seen that in the well beaten paths of the plaintiff in error to the courts *the questions they now make have been decided against* them," which decision is hereby assigned as error upon the following grounds:

(a) In said cases there was not drawn in question the validity and constitutionality of the improvement assessment statutes in question (Ga. Laws 1919, pp. 934 et seq. and Ga. Laws 1924, pp. 534 et seq.), and the court in said decisions did not decide or pass upon "the questions now raised on the legality of the assessment." In no previous decisions have the courts rendered any binding decision with reference to the constitutionality of said statutes nor of the improvement assessment made thereunder.

[fol. 169] (b) The Supreme Court of the State of Georgia misinterpreted the decisions heretofore rendered by the Supreme Court of the United States in former cases between appellants and appellee. In none of said cases have the legality and constitutionality of the Acts in question or the improvement assessment in question (as construed and enforced by the Supreme Court of Georgia) been drawn in question nor passed upon by the Supreme Court of the United States.

6. The Supreme Court of the State of Georgia erred in holding that appellants "did not show that the street railway franchise and property thereunder was the whole franchise and property held and operated by appellants in connection with their street railway and power business in the city; that they failed to show that they were not also operating in connection with the street railway business an electric light and power business in the city and that such franchise and property was not acquired by the Georgia Power Company in the merger."

Said decision is assigned as error on the following grounds:

(a) The Supreme Court of the State of Georgia held that the municipal franchise ordinance, under and by virtue of which the street railway lines in Decatur were constructed and being operated, offered in evidence by appellants, was properly excluded as being irrelevant and immaterial evidence. Said franchise (Exhibit 10 of the motion for new trial, record page —), if admitted in evidence, would have established the fact that street railway lines were constructed and being operated in the City of Decatur separately and independently from any and all electric light and power business.

(b) In a suit between appellants and the appellee, the appellee had established that the said municipal franchise, under and by virtue of which the street railway lines in the City of Decatur were constructed and being operated, [fol. 170] was distinct and separate, and a distinct classification from other franchises and from the electric business and electric property subsequently acquired.

(c) Separate and distinct municipal franchises and separate and distinct business and classification of business did not become one franchise and one business either by a conveyance of them into one company or by the merger of or consolidation of various companies into another company.

7. Because the Supreme Court of Georgia erred in holding, "If * * * all of the evidence excluded over objection had been admitted, the same would not have changed the status of the case but would have been immaterial to its consideration." Said decision is hereby assigned as error upon the following grounds:

(a) It denied appellants the due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States in that it deprived appellants of the right to have a judicial consideration and determination upon the evidence offered by it to prove and which, if admitted, would have proved and established an entire absence of benefits to appellants and appellants' property from the improvement for which the assessment in question was held to be a general personal obligation of appellants and a blanket lien against appellants and all of appellants' property from the time of the ordinance making the assessment.

(b) It excluded from consideration the municipal franchise under and by virtue of which the street railway lines in the City of Decatur were constructed and being operated, which franchise (set out in Ground 10 of the amended motion for new trial, record page No. —), showed that the street railway lines and property in Decatur were distinct and separate from the power property and electric power business of appellants.

[fol. 171] 8. Because the Supreme Court of Georgia erred in holding: "The City authorities in causing the paving and making the assessment may very well have considered in determining the benefits to be derived therefrom, the value of the whole property and not merely the value of one branch of the service. Under the consolidation agreement wherein the Georgia Railway & Electric Company and the Georgia Railway & Power Company merged into the Georgia Power Company, all franchises originally granted the separate companies were consolidated and merged into one franchise * * *," which decision is assigned as error upon the following grounds:

(a) The mere consolidation of several companies into one company does not consolidate all of the various, separate and distinct franchises granted to each separate and distinct company "into one franchise"; and does not make the separate and distinct business of distributing electrical energy and power to the public one and the same business as that of furnishing street railway passenger service, and does not justify a consideration of all of appellants' property, personal or otherwise, wherever situated or possessed, as a basis of the improvement assessment in question. Said decision of the Supreme Court of the State of Georgia was

unreasonable, discriminatory and an arbitrary exaction, depriving appellants of the equal protection of the law as guaranteed by the Fourteenth Amendment of the Constitution of the United States and results in an unconstitutional confiscation of appellants' property, for that said decision makes all of appellants' property, personal as well as real, and irrespective of where situated or possessed, the basis of the said improvement assessment; although as to all parties other than appellants and street railway companies such assessments are based only on special benefits accruing to the particular real estate specially affected and benefitted by the improvement for which they are levied.

[fol. 172] 9. The Supreme Court of the State of Georgia, having held, under the consolidation agreement of 1927, whereby the Georgia Railway & Electric Company and Georgia Railway & Power Company were merged into the Georgia Power Company under a charter granted by the Secretary of the State of Georgia, under Section 2607 of the Civil Code of Georgia that,—"all franchises originally granted separate companies were consolidated and merged into one franchise," erred in thereafter holding in said decision that the five-cent rate of fare franchise between one of said appellants and the City of Decatur was "still in force" and that losses attributable thereto were "immaterial" to the determination of the validity and constitutionality of said legislative acts and the improvement assessments made thereunder "while the rate contract continues." Said holding of the State court was violative of the Fourteenth Amendment of the Constitution of the United States for that it resulted in confiscation of appellants' property and deprived them of their property without due process of law and the said holding is assigned as error upon the following grounds, to wit:

(a) The merger of all franchises into one franchise by virtue of a consolidation, as held by said court, terminated the separate and several franchises of the consolidated companies; and it was unreasonable, arbitrary and discriminatory for said Court to hold that all franchises were merged into one, for the purpose of justifying its consideration of all of the appellants' property, real or personal, street railway or electrical, and wherever situated or possessed, on the question of whether benefits resulted to appellants from

the improvement in question, and to thereafter hold that said franchises were not merged into one and that the five-cent fare franchise continued in force, so as to sustain the refusal of the trial court to allow appellants to show a total [fol. 173] absence of benefits accruing to their property as a consequence of the improvement in question.

(b) The merger of all franchises into one franchise by virtue of a consolidation, as held by said Court, terminated the separate and several franchises of the consolidated companies; and it was error for the Court, after so holding, to thereafter hold that the five-cent rate of fare franchise continued in force as a separate and distinct franchise so as to render the proof of losses thereunder immaterial on the question of special benefits, (made the sole basis for sustaining the improvement assessment in question), and so as to place said named franchise in a separate classification from all other franchises of appellants for the purpose, in effect, of denying jurisdiction to the Public Service Commission of the State of Georgia over said five-cent rate of fare franchise.

For which errors appellants pray that the said judgment of the Supreme Court of the State of Georgia, dated September 18, 1934, in the above-entitled cause, be reversed and a judgment rendered in favor of the said appellants.

This 8th day of November, 1934.

Walter T. Colquitt, Colquitt, Parker, Troutman & Arkwright, Counsel for Appellants.

[File endorsement omitted.]

[fol. 174] IN SUPREME COURT OF GEORGIA

[Title omitted]

ORDER ALLOWING APPEAL—Filed Nov. 8, 1934

The petition of Georgia Railway & Electric Co., Georgia Railway & Power Co., and Georgia Power Company for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Georgia, and the assignment of errors filed therewith, and the statement disclosing basis of jurisdiction of the Su-

preme Court of the United States and the record of said cause having been considered, it is

Ordered that an appeal be and is allowed to the Supreme Court of the United States from the Supreme Court of the State of Georgia, as prayed in said petition; and that the clerk of the Supreme Court of the State of Georgia shall prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within 30 days from the date hereof.

It is further ordered that the said Georgia Railway & Electric Co., Georgia Railway & Power Co., and Georgia Power Company shall give good and sufficient security in the sum of One Thousand Dollars, ($1,000.00), that said appellants shall prosecute said appeal to effect, and if said appellants fail to make their plea good, they shall answer all damages and costs.

The said appellants now presenting a bond in the sum of [fol. 175] One Thousand Dollars, ($1,000.00), with Maryland Casualty Co. as surety, it is ordered that the same be, and is hereby, approved. The appeal shall operate as a supersedeas. This 8th day of November, 1934.

Marvin W. Beck, Presiding Justice of the Supreme Court of the State of Georgia. (Chief Justice of said court being disqualified.)

[File endorsement omitted.]

[fols. 176-180] Supersedeas bond on appeal for $1,000 approved and filed Nov. 8, 1934, omitted in printing.

[fol. 181] Citation, in usual form, showing service on Branch & Howard, filed Nov. 8, 1934, omitted in printing.

[fol. 182] IN SUPREME COURT OF GEORGIA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Nov. 8, 1934

To the Clerk of the Supreme Court of the State of Georgia:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States pur-

suant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following:

1. The entire transcript of the record in the case from the Superior Court of Fulton County to the Supreme Court of the State of Georgia.

2. The judgment, opinion and decision of the Supreme Court of the State of Georgia rendered on the 18th day of September, 1934.

3. This præcipe and service thereon.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Supreme Court and to be filed in the office of the clerk of the Supreme Court of the United States at Washington, D. C., on or before thirty days from the date of this præcipe.

This 8th day of November, 1934.

Walter T. Colquitt, Colquitt, Parker, Troutman & Arkwright, Attorneys for Appellants.

Service of the above præcipe accepted and acknowledged this 8th day of November, 1934.

James A. Branch, Branch & Howard, Attorneys for Appellee.

[File endorsement omitted.]

[fols. 183-190] IN SUPREME COURT OF GEORGIA

[Title omitted]

NOTICE OF PRÆCIPE—Filed Nov. 8, 1934

To Messrs. Branch and Howard, Attorneys for City of Decatur, Appellee:

Please take notice that on the 8th day of Nov., 1934, the undersigned filed with the clerk of this court a præcipe for the record to be transmitted to the Supreme Court of the United States on the appeal allowed in the above cause, a copy of which præcipe is hereby served upon you as attorneys for appellee.

This 8th day of November, 1934.

Walter T. Colquitt, Colquitt, Parker, Troutman & Arkwright, Attorneys for Appellant.

Service of the above notice of præcipe acknowledged. All other and further service waived.

James A. Branch, Branch & Howard, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 191] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 192] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed Dec. 11, 1934

Come now Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, the appellants in the above entitled cause, and adopt their assignments of error as their statement of the points to be relied upon, and state that the whole of the record, as filed, is necessary for the consideration of the case.

This the 6th day of December, 1934.

Walter T. Colquitt, Colquitt, Parker, Troutman & Arkwright, Counsel for Appellants.

[fol. 193] Service of the within and foregoing statement of the points to be relied upon and designation of the parts of the record to be printed is hereby acknowledged. Copy received. All other and further service and notice waived.

This the 6th day of December, 1934.

James A. Branch, Branch & Howard, Howell, Heyman & Bolding, Counsel for City of Decatur, Appellee.

[fol. 194] [File endorsement omitted.]

Endorsed on cover: File No. 39,198. Georgia, Supreme Court. Term No. 570. The Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, Appellants, vs. City of Decatur. Filed December 11, 1934. File No. 570, O. T., 1934.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 570

THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY,

Appellants,

vs.

CITY OF DECATUR.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

APPELLANTS' STATEMENT DISCLOSING BASIS OF JURISDICTION OF SUPREME COURT OF THE UNITED STATES.

By Act of Congress of January 31, 1928, "the writ of error in cases civil and criminal, is abolished." Said Act provides that all relief which could heretofore be obtained by writ of error shall thereafter be obtained by appeal.

The Act of April 26th, 1928, made the former statutes relating to right of writ of error applicable in cases of appeal provided for in the Act of January 31, 1928.

The Act of February 13th, 1925, defining the jurisdiction of the Supreme Court of the United States and re-enacting

Judicial Code Section 237 (28 U. S. Code Ann. 344) provides:

> "A final judgment or decree in any suit in the highest court of a State in which decision in the suit could be had * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

On the 18th day of September, 1934, the Supreme Court of the State of Georgia rendered final judgment in the case at bar and passed on the constitutional question now sought to be reviewed.

The case at bar was a civil one in which the appellee (City of Decatur) sought to recover of the appellants the sum of $13,444.66, with interest from the 21st day of June, 1926, on a special improvement paving assessment made against appellants under Georgia Laws 1919, page 934 *et seq.* and Georgia Laws 1924, page 534 *et seq.* To the petition filed by appellee, the appellants filed a demurrer and a motion to dismiss, drawing in question the validity of said statutes of the State of Georgia, and thereafter by answer, denying liability, also drew in question the validity of said statutes of the State of Georgia upon the ground that said statutes (under which the special assessment was made), were unconstitutional and repugnant to the Fourteenth Amendment of the Constitution of the United States in that they deprived appellants of the equal protection of the law and the due process of law and confiscated appellants' property in contravention of said constitutional provisions.

The trial court overruled each and every ground of said demurrer. Exceptions to said rulings were preserved in the manner provided for by State practice. Thereafter upon the trial of said case, a verdict was directed against

appellants for the full amount sued for, together with interest, and a judgment entered thereon. The said judgments and verdicts together with the decisions of the trial court, ruling that the said acts attacked were constitutional, were by proper method of State procedure carried to the Supreme Court of Georgia, the highest court in which a decision in said suit could be had. The said court sustained the judgment of the trial court and the verdict rendered against appellants, and rendered a decision in favor of the constitutionality of said acts under and by virtue of which the paving assessment against appellants had been made.

The provisions of Georgia Laws of 1919, page 934 *et seq.* and Georgia Laws 1924, page 534 *et seq.*, involved in the case at bar, are practically the same. Said acts provide that the City of Decatur, in the County of DeKalb, "shall have full power and authority, in their discretion, as hereinafter prescribed, to grade, regrade, pave, repave, build, rebuild and otherwise improve or reimprove any of the streets, alleys, lanes, squares or public places of said city now laid out and constructed. In order to make effective the power and authority above given and to provide funds therefor, said commissioners shall have full power and authority to assess the actual cost of such improvements above provided on the real estate abutting on any street, alley, lane, square or public place where improved, one-half (½) of the cost of such improvement shall be assessed against the real estate abutting on the other side of such street, alley, lane, square or public place where improved, and one-half (½) of the cost of such improvement shall be assessed against the real estate abutting on the other side of such street, alley, lane, square or public place where improved; and any street railroad company or other railroad company having a track or tracks running along or across the streets, alleys, lanes, squares or public places of said

city where so improved shall be required to pay the actual cost in full of grading, regrading, paving, repaving, building, rebuilding and otherwise improving or reimproving such street, alley, lane square or public place between their tracks and for two (2) feet on each side thereof and in such cases and on such streets, alleys, lanes, squares or public places where such assessments are made against such street railroad company or other railroad company, the remaining cost of such improvement shall be assessed against the real estate abutting on the street, alley, lane, square or public place where so improved, one-half (½) of such cost shall be assessed against the real estate "abutting on the street, alley, lane, square or public place where so improved, one-half (½) of such cost shall be assessed against the real estate abutting on one side of such street, alley, lane, square or public place and the other one-half (½) of said cost shall be assessed against the real estate abutting on the other side thereof; provided that no grading, regarding, paving, repaving, building, rebuilding, or otherwise improving or reimproving any street, alley, lane, square or public place in said city and no assessments made, under the authority, power and provisions of this section shall be made unless provided for by ordinance, such ordinance to provide for doing the work and notice of the introduction of which shall be published in some newspaper of said city, and if there is no newspaper published therein, then in some newspaper having a general circulation in said city, one time at least ten (10) days before the adoption of said ordinance, so that any person interested in said improvement may file his objection thereto with the city clerk and be heard by the commissioners. Said notice shall contain a statement of the street, alley, lane, square or public place to be improved or the part to be improved and the kind of improvements to be made, the date of the meeting of the

commissioners at which said ordinance will be considered for adoption, and the same may be adopted at said meeting or some subsequent meeting, in the discretion of the commissioners, after such notice has been given. The amount of the assessment on each piece of real estate abutting on the street, alley, lane, square or public place where such improvements have been made shall be a lien on the real estate, such lien dating from the time of the passage of the ordinance making the assessment; and the amount of the assessment for such improvement against said street railroad company or other railroad company and against the property thereof shall be a lien against such railroad company and against the property thereof, "dating from the time of the passage of the ordinance making the assessment. The said ordinance making the assessment against the abutting real estate and against such railroad company and the property thereof shall be made by the commissioners of said city after the completion of such improvements and when the cost thereof shall have been determined; and when the commissioners of said city have levied and assessed the cost of such improvement against the abutting real estate and against such street railroad company or other railroad company and against the property thereof, as above provided, they shall have full power and authority to enforce the collection of the amount of any such assessment so made for such improvement, by execution to be issued by the clerk of said city, against said abutting real estate and the owner thereof at the time of making the assessment and in accordance with such assessments, when the same is against such real estate; and against said street railroad company or other railroad company and against the property thereof when the same is against such railroad company and such property. Such executions shall be levied by the marshal

of said city and after advertising and other proceedings, as in the case of sale of realty for city taxes, such property so levied upon, whether the same be abutting real estate or property of such railroad company or companies, may be sold by the marshal of said city at public outcry to the highest bidder, and such sale shall vest absolute title to such property in the purchaser; * * *. The lien for the assessment on abutting property and on street railroad or other railroad companies for making street improvements as heretofore provided shall have rank and priority of payment next in point of dignity to liens for taxes."

The appeal in the case at bar seeks to carry to the Supreme Court of the United States for review the question of the validity of the said statutes of the State of Georgia on the ground that said statutes as construed and enforced against appellants were repugnant to the Fourteenth Amendment of the Constitution of the United States.

The decision of the Supreme Court of the State of Georgia in favor of the constitutionality of the said Georgia statutes brings the case at bar within the jurisdictional provisions of the Act of Congress of February 13, 1925, wherein Section 327 of the Judicial Code was re-enacted (28 U. S. Code Ann. 344), and the Acts of Congress of January 31, 1928, and of April 26, 1928, heretofore referred to.

Kansas City Sou. R. Co. v. *Road Improvement District*, 256 U. S. 658.

See also:

Thomas v. *Kansas City Sou. R. Co.*, 261 U. S. 481.

Norwood v. *Baker*, 172 U. S. 269.

Road Improvement Dist. No. 1 of Ark. v. *Missouri Pacific R. Co.*, 274 U. S. 188.

Standard Pipe Line Co. v. *Miller County Hwy. Dist.*, 277 U. S. 160, 162.

The decision of the Supreme Court of the State of Georgia sought to be reviewed was rendered on the 18th day of September, 1934, and the application for appeal from said decision to the Supreme Court of the United States is presented the 8th day of November, 1934.

Respectfully submitted,
WALTER T. COLQUITT,
COLQUIT, PARKER, TROUTMAN & ARKWRIGHT,
Attorneys for Appellants.

Service of the foregoing statement acknowledged, copy received. All other and further service and notice waived. This 8th day of November, 1934.

JAMES A. BRANCH,
BRANCH & HOWARD,
Attorneys for Appellee.

Filed in office Nov. 8, 1934, K. C. Bleckley, D. C. S. C., Ga.

(5732-C)

FILED
FEB 9 1935
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1934

No. 570

THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY,

Appellants,

vs.

CITY OF DECATUR,

Appellee.

BRIEF OF APPELLANTS, THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY.

WALTER T. COLQUITT,
COLQUITT, PARKER, TROUTMAN & ARKWRIGHT,
Attorneys for Appellants.

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THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY,
Appellants,

vs.

CITY OF DECATUR,
Appellee

No. 570
October Term, 1934.
Supreme Court of the United States.

BRIEF OF APPELLANTS, THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY

I.

OPINION AS DELIVERED IN THE COURT BELOW

As yet the opinion delivered in the case at bar by the Supreme Court of the State of Georgia has not been reported in the official Georgia Reports.

The opinion brought to this Court for review is found in the printed transcript of the record, pages 126-147.

II.

FEDERAL QUESTIONS INVOLVED SHOWING THE JURISDICTION OF THIS COURT

In accordance with Paragraph 1 of Rule 12 there has heretofore been compiled and filed with this Court a concise statement of the grounds on which the jurisdiction of this Court is invoked. In addition to what is therein stated

the jurisdiction and decision of this Court is invoked upon the following additional Federal questions:

The Supreme Court of the State of Georgia sustained and upheld the rulings of the trial court denying appellants the right and opportunity to present evidence showing that appellants' property received no benefits from the improvement in question. This was a denial of the due process of law provision and the equal protection of law clause of the 14th Amendment to the Constitution of the United States.

Sanders v. Shaw, 244 U. S. 317;

Sneider v. Massachusetts, 291 U. S. 97, 128.

A Federal question is raised and involved in that the construction placed upon said statutes in question made the legislative presumption of benefits conclusive and deprived appellants of the right to establish by evidence an entire lack of benefits, and, as thus construed and enforced against appellants, denied them the equal protection of law and the due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

Bandini Petroleum Co. v. Superior Court, 284 U. S. 8, 19.

III.

STATEMENT OF CASE

The City of Decatur (a Municipal corporation of the State of Georgia, DeKalb County) brought a suit in the Superior Court of Fulton County, Georgia to recover a personal and general money judgment for $13,444.66 and interest, from June 21st, 1926, against each of appellants by virtue of a special paving assessment for street improvement.

(Printed record, pages 5–19.)

The said improvement assessment was made under and by virtue of legislative acts of the State of Georgia, giving

the City of Decatur the right or power to improve and re-improve its streets "and to make assessments against the abutting real estate and against any street railway or other railroad company and the property thereof having a car track or car tracks running along or across said streets, lanes, squares or public places for the cost of such improvements." (Ga. Laws 1919, pp. 934 et seq., and Ga. Laws 1924, pp. 534, et seq.)

Appellants Contentions and Pleadings

Appellants by demurrer and motion to dismiss the petition, and by answer, pleaded:

Under said legislative acts the City of Decatur was not entitled to a personal and general money judgment against appellants or a blanket lien against all of appellants' property, both real and personal.

In Georgia, all special improvement assessments are an exercise of the taxing power. By virtue of the Georgia constitutional provisions (Ga. Code Section 6553), requiring taxation to be uniform and ad valorem on all property and levied under general laws, all special improvement assessments are and must be based upon special benefits to the particular property assessed, produced by the improvement.

Special assessments are based upon real property and not upon personal property; are confined to the real property specially benefited, and are not general and personal obligations of the property owner. Executions therefor do not run generally against the property owner, nor against the property of the owner not situated upon the street improved, and are enforceable only against the property specially benefited.

(Demurrer, printed record pages 38-41. Answer, printed record pages 20-37.)

It was specifically pleaded that neither appellants nor appellants' property received any benefit from the improvement in question.

(Printed record, pages 28, 29, 30, 33, 34.)

Appellants specially pleaded that if the legislative Acts of the State of Georgia (Ga. Laws 1919, pp. 934 et seq. and Ga. Laws 1924, pp. 534 et seq.) and the Municipal assessment ordinances passed thereunder be so construed as to create a blanket lien against all of appellants' property (both real and personal), and a personal and general liability upon appellants, then, under the facts pleaded in the case at bar, said Acts and Ordinances as thus construed would be illegal, void and unconstitutional; in contravention of the equal protection clause, and the due process of law provision of the 14th Amendment to the Constitution of the United States.

It was specifically pleaded that such construction of said Acts and assessment ordinances would unconstitutionally discriminate against appellants; would unconstitutionally confiscate their property, and unconstitutionally deprive them of the equal protection of law and the due process of law guaranteed by the 14th Amendment of the Constitution of the United States.

Appellants attacked said Acts, as thus construed, as being unconstitutional and in violation of the equal protection clause and due process provision of the 14th Amendment of the Constitution of the United States, for that:

(a) As against all other property owners, special improvement assessments must be based upon special benefits accruing to the particular property affected thereby; whereas, as against street railway companies (appellants), neither the street railway company nor the street railway company's property received any special benefit from the improvement in question. (Appellants specifically pleaded that neither appellants nor appellants' property received any benefits from

the improvement in question and were denied the right to establish such fact by evidence.)

(b) As against all other parties, improvement assessments are in rem and not in personam and are enforceable solely against the property specially benefited; whereas, as against appellants, the improvement assessment is in personam and a blanket lien against all of appellants' property, both real and personal, and is not confined to particular property benefited.

(c) As against all other parties, such assessments cannot exceed the special benefits accruing to particular property specially benefited; whereas, as against appellants, the assessment exceeds all special benefits to any and all property and to the property owner.

(d) As against all other parties, improvement assessments are based upon and confined to the real property alone; whereas, as against appellants, the assessment is not confined to real property but is based upon personal as well as real property.

(e) As against all other parties such assessments, being confined to real property, can not be enforced against personalty; whereas, as against appellants, such assessments are not to be confined to real property but can be based upon and enforced against personal property.

(Demurrer, printed record pages 39–41. Answer, printed record pages 29, 31, 33.)

In the trial of the case, appellants objected to evidence showing the value of personal property of appellants, the objection being—"Personal property could not be made the basis of any special paving assessment and to allow personal property of the company and the value of personal property to be considered in a paving assessment or in arriving at a paving assessment would deprive appellants and each of them of the equal protection of the law as guaran-

teed to them by the 14th Amendment to the Constitution of the United States, for that, with reference to all other persons and all other special paving assessments, personal property and the value thereof, was not considered as a basis for paving assessments or in arriving at the amount of paving assessments." Said objection was overruled and the evidence admitted.

(Printed record, pages 80–81.)

Against all other parties (than appellants) the legislative presumption of benefits is rebutted and a prima facie case of confiscation is established by evidence that the entire value of the particular property specially benefited, will be required to pay the assessment; whereas, as against street railway companies (appellants) said legislative presumption of benefits is and can not thus be rebutted.

In the case at bar, appellants specially pleaded that its entire street railway property and franchises in the municipal limits of Decatur were not of sufficient value to pay the assessment in question. As evidentiary of this fact, appellants offered and tendered all of its railway property and franchises located within the municipality.

(Printed record, pages 99–104.)

The court refused appellants the right to introduce evidence and testimony to establish said facts.

(Printed record, pages 99–107.)

As against all other parties than appellants, evidence showing the entire absence of benefits, conclusively rebuts the legislative presumption of benefits and establishes unconstitutional confiscation of property; whereas, in the case at bar, as against street railway companies, (appellants), the court in effect holds that the legislative presumption of benefits and confiscation can not thus be rebutted, and that legislative presumption of benefits is conclusive and not rebuttable.

The court held that all of the documentary and oral evidence offered and tendered by appellants, establishing the fact that appellants and appellants' property had received no benefits whatever from the paving improvement in question, was inadmissible.

(Printed record, pages 105–107.)

The Supreme Court of the State of Georgia held that if such evidence had been admitted, (although uncontradicted), it "would not have changed the status of the case but would have been immaterial to its consideration."

(Printed record, pages 146–147.)

In the trial of the instant case, the lower or trial court construed the legislative acts in question as precluding appellants from any right to show the lack of benefits and excluded all of the evidence and testimony tendered and offered by appellants establishing the entire absence of benefits from the improvement in question.

(Printed record, pages 99–107.)

The trial court directed a personal and general money judgment against appellants for the amount sued for and gave plaintiff in the court below (appellee) a lien by general judgment for said improvement assessment upon any property of defendants (appellants) *wherever located*.

(See printed record pp. 124–126.)

Appellants contended that said improvement acts as thus construed and enforced against appellants, the exclusion of all evidence offered by appellants, followed by the direction of a verdict and decree giving appellee a personal and general judgment against appellants and a lien by general judgment for said improvement assessment on any property of appellants *wherever located*, was a denial of the due process of law and the equal protection provision of the 14th Amendment to the Constitution of the United States.

The different and various rulings of the trial court, the overruling of the demurrer, the rejection of all evidence offered by appellants, the direction of the verdict and the decree entered thereon and all the Federal questions attacking the constitutionality of the improvement statute and the special assessment in question, as construed and enforced against appellants, were duly carried to the Supreme Court of the State of Georgia.

The Supreme Court of the State of Georgia (the highest court of this State in which a decision could be had) upheld the constitutionality of the said improvement acts, as construed and enforced against appellants, and upheld the improvement assessment in question and held that under said improvement statutes appellee was entitled to a personal and general judgment and that from the time of the ordinance making the assessment the appellee had a general lien for said improvement assessment "on any property of the appellants *wherever located*."

(Printed record p. 125 and 126.)

IV.

SPECIFICATION OF THE ASSIGNED ERRORS UPON WHICH A DECISION OF THIS COURT IS INVOKED

Appellants respectfully request a consideration and determination of each and all of the assignments of error made in the case at bar.

These assignments of error are set out on pages 151-159 of the printed transcript of the record and are as follows:

1. The Supreme Court of the State of Georgia (the highest Court of said State) erred in holding that the legislative acts of the State of Georgia, giving the City of Decatur the right to improve and reimprove its streets and make assessments for such improvements and reimprovements against

street railway companies (Ga. Laws 1919, pp. 934, et. seq. and Ga. Laws 1924, pp. 534 et. seq.), amending and adding to the charter powers of the City of Decatur, and giving it the right to improve and reimprove its streets and make assessments against street railway companies and the property thereof, were valid, legal and constitutional acts.

In said suit there was drawn in question the validity and constitutionality of said acts and statutes of the State of Georgia on the ground that they were repugnant to the equal protection and the due process of law provisions of the Fourteenth Amendment to the Constitution of the United States, and on the ground that they, as construed and enforced by the State Court, confiscated appellants' property in violation of the Fourteenth Amendment to the Constitution of the United States. The decision of the Supreme Court of the State of Georgia was in favor of the validity of said statutes, which decision is hereby assigned as error.

2. In said suit there was drawn in question the validity and constitutionality of the said statutes of the State of Georgia (Ga. Laws 1919, pp. 934 et. seq. and Ga. Laws 1924, pp. 534 et. seq.) on the ground that said statutes were repugnant to the Fourteenth Amendment of the Constitution of the United States in that they denied to appellants and each of them the equal protection of the law and the due process of law as therein guaranteed, and confiscated the property of appellants in contravention of said Federal Constitutional Amendment. The decision of the Supreme Court of the State of Georgia was in favor of the validity and constitutionality of said statutes, which decision is hereby assigned as error.

In Georgia, by virtue of the provisions of the State Constitution, requiring uniformity of taxation, as embodied in Civil Code of Georgia, 1910, Section 6553, the Supreme Court of Georgia holds that all improvement assessments and the statutes under which they are levied must be based upon

and are sustained only to the extent that special benefits accrue to the particular property affected.

Appellants say that the aforesaid special improvement statutes of the State of Georgia, as construed and enforced by the Supreme Court of Georgia, against appellants in the case at bar, denied to appellants the equal protection of the law and the due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and resulted in the confiscation of appellants' property in contravention of said constitutional provisions, upon each of the following grounds:

(a) As against all other parties (owners of property), the assessments made under said legislative acts must be based upon special benefits accruing to the particular property affected thereby. As against street railway companies and appellants in the instant suit, the paving assessment need not be based upon special benefits accruing to particular property affected thereby.

(b) Under said legislative acts as construed and enforced against all other parties, improvement assessments (and executions therefor) are in rem and not in personam and are enforceable solely against the particular property specially benefited. As against street railway companies and appellants, the improvement assessment (and executions therefor) are in personam—a blanket lien against the street railway companies and appellants and also against all of their properties—and are not confined to particular property benefited.

(c) As against all other parties, such assessments cannot exceed the special benefits accruing to the particular property specially benefited thereby, but as against street railway companies and appellants, such assessments can exceed not only the special benefits resulting to the particular property affected thereby, but also all special benefits whatever resulting to the property owner.

(d) As against all other parties, such assessments are

confined to the real property specially benefited and cannot be based upon general benefits to other property, but as against street railway companies and appellants, said assessments are not confined to real property specially benefited but can be and are based upon all property of any kind or character.

(e) As against all other parties, such assessments are confined to real property and cannot be enforced against personal as well as real property, but as against street railway companies and appellants, such assessments are not to be confined to real property but can be based upon personal property, as well.

(f) As against all other parties, the legislative presumption of benefits in the case of assessments levied under said statutes and the municipal ordinances enacted thereunder are rebutted and a prima facie case of confiscation is established by proof that the entire value of the particular property specially benefited is required to pay the assessment, but as against street railway companies and appellants, the said presumption of benefits is not rebutted and a prima facie case of confiscation is not established by such proof.

(g) As against all other parties, evidence showing the entire absence of special benefits conclusively rebuts the legislative presumption of benefits as embodied in said statutes and the municipal ordinances enacted thereunder, and establishes unconstitutional confiscation of property; but as against street railway companies and appellants, the legislative presumption of benefits are conclusive and not rebuttable, the Georgia Supreme Court, in passing upon the question of benefits from local improvements in the case at bar, holding that documentary and oral evidence and testimony offered by appellants showing and proving that appellants and appellants' property had received no benefits whatever from the paving improvement in question was irrelevant and immaterial, and that such evidence, if admitted (although

uncontradicted), "would not have changed the status of the case but would have been immaterial to its consideration."

3. The Supreme Court of the State of Georgia erred in holding that the demurrers (or motions to dismiss the petition) filed by appellants to the petition brought by the City of Decatur against appellants were properly overruled.

(a) In said demurrers there was drawn in question the validity and constitutionality of the said statutes of the State of Georgia, (Ga. Laws 1919, pp. 934 et. seq. and Ga. Laws 1924, pp. 534 et. seq.) on the ground that they were repugnant to the Fourteenth Amendment to the Constitution of the United States, in that they denied to appellants the equal protection of the law and the due process of law therein guaranteed and in that the construction and enforcement of said statutes under said decision confiscated appellants' property in contravention of said constitutional provisions. The judgment overruling the demurrers filed by appellants was in favor of the validity and constitutionality of said statutes, which decision is hereby assigned as error.

(b) In passing upon said demurrers the Supreme Court of the State of Georgia construed and enforced said statutes as making said legislative enactment and municipal ordinances passed thereunder absolutely conclusive against street railway companies and appellants on the question of benefits from the improvement or reimprovement of streets; and denied to street railway companies and appellants any judicial hearing, trial or adjudication with reference to the question of benefits resulting from street improvements made under said statutes.

4. The Supreme Court of the State of Georgia erred in holding that the trial court properly excluded any and all testimony and evidence offered and tendered by appellants which would show or establish the fact that appellants and appellants' property had received no benefits from the street paving improvement in question: and erred in holding that

if said evidence "excluded over objection had been admitted, the same would not have changed the status of the case but would have been immaterial to its consideration."

Said decision of the Supreme Court of Georgia was erroneous in that it denied appellants the right to introduce evidence showing and establishing an entire absence of benefits from the street improvement in question, and denied to them any judicial investigation or determination of the question of benefits or the entire absence of benefits, and thus denied appellants the due process of law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of the State of Georgia erred in holding: "The question of no benefit, that the paving assessment was confiscatory, the offer to surrender, and abandon the property—in fact, the questions now raised on the legality of the assessment—were made in that case and in the case of Georgia Railway and Power Company v. Decatur, 152 Ga. 143; 262 U. S. 432, and were decided adversely to the contention of the railway companies. (Georgia Railway and Power Company v. City of Decatur, 168 Ga. 705.) The Supreme Court of the United States, on review of this case, affirmed it. (Georgia Power Company v. City of Decatur, 74 U. S. Law Edition 999, 281 U. S. 505). So it may be easily seen that in the well beaten paths of the plaintiff in error to the courts the questions they now make have been decided against them," which decision is hereby assigned as error upon the following grounds:

(a) In said cases there was not drawn in question the validity and constitutionality of the improvement assessment statutes in question. (Ga. Laws 1919, pp. 934 et. seq. and Ga. Laws 1924, pp. 534 et. seq.), and the court in said decisions did not decide or pass upon "the questions now raised on the legality of the assessment." In no previous decisions have the courts rendered any binding decision with reference

to the constitutionality of said statutes nor of the improvement assessment made thereunder.

(b) The Supreme Court of the State of Georgia misinterpreted the decisions heretofore rendered by the Supreme Court of the United States in former cases between appellants and appellee. In none of said cases have the legality and constitutionality of the Acts in question or the improvement assessment in question (as construed and enforced by the Supreme Court of Georgia) been drawn in question nor passed upon by the Supreme Court of the United States.

6. The Supreme Court of the State of Georgia erred in holding that appellants "did not show that the street railway franchise and property thereunder was the whole franchise and property held and operated by appellants in connection with their street railway and power business in the city; that they failed to show that they were not also operating in connection with the street railway business and electric light and power business in the city and that such franchise and property was not acquired by the Georgia Power Company in the merger."

Said decision is assigned as error on the following grounds:

(a) The Supreme Court of the State of Georgia held that the municipal franchise ordinance, under and by virtue of which the street railway lines in Decatur were constructed and being operated, offered in evidence by appellants, was properly excluded as being irrelevant and immaterial evidence. Said franchise (Exhibit 10 of the motion for new trial, record page..); if admitted in evidence, would have established the fact that street railway lines were constructed and being operated in the City of Decatur separately and independently from any and all electric light and power business.

(b) In a suit between appellants and the appellee, the appellee had established that the said municipal franchise, under and by virtue of which the street railway lines in the

City of Decatur were constructed and being operated, was distinct and separate, and a distinct classification from other franchises and from the electric business and electric property subsequently acquired.

(c) Separate and distinct municipal franchises and separate and distinct business and classification of business did not become one franchise and one business either by a conveyance of them into one company or by the merger of or consolidation of various companies into another company.

7. Because the Supreme Court of Georgia erred in holding, "If * * * * all of the evidence included over objection had been admitted, the same would not have changed the status of the case but would have been immaterial to its consideration." Said decision is hereby assigned as error upon the following grounds:

(a) It denies appellants the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States in that it deprived appellants of the right to have a judicial consideration and determination upon the evidence offered by it to prove and which, if admitted, would have proved and established an entire absence of benefits to appellants and appellants' property from the improvement for which the assessment in question was held to be a general personal obligation of appellants and a blanket lien against appellants and all of appellants' property from the time of the ordinance making the assessment.

(b) It excluded from consideration the municipal franchise under and by virtue of which the street railway lines in the City of Decatur were constructed and being operated, which franchise (set out in Ground 10 of the amended motion for new trial, record page No. . .), showed that the street railway lines and property in Decatur were distinct and separate from the power property and electric power business of appellants.

8. Because the Supreme Court of Georgia erred in hold-

ing: "The City authorities in causing the paving and making the assessment may very well have considered in determining the benefits to be derived therefrom, the value of the whole property and not merely the value of one branch of the service. Under the consolidation agreement wherein the Georgia Railway & Electric Company and the Georgia Railway & Power Company merged into the Georgia Power Company, all franchises originally granted the separate companies were consolidated and merged into one franchise * * *," which decision is assigned as error upon the following grounds:

(a) The mere consolidation of several companies into one company does not consolidate all of the various, separate and distinct franchises granted to each separate and distinct company "into one franchise;" and does not make the separate and distinct business of distributing electrical energy and power to the public one and the same business as that of furnishing street railway passenger service, and does not justify a consideration of all of appellants' property, personal or otherwise, wherever situated or possessed, as a basis of the improvement assessment in question. Said decision of the Supreme Court of the State of Georgia was unreasonable, discriminatory and an arbitrary exaction, depriving appellants of the equal protection of the law as guaranteed by the Fourteenth Amendment of the Constitution of the United States and results in an unconstitutional confiscation of appellants' property, for that said decision makes all of appellants' property, personal as well as real, and irrespective of where situated or possessed, the basis of the said improvement assessment; although as to all parties other than appellants and street railway companies such assessments are based only on special benefits accruing to the particular real estate specially affected and benefited by the improvement for which they are levied.

9. The Supreme Court of the State of Georgia, having held, under the consolidation agreement of 1927, whereby

the Georgia Railway & Electric Company and Georgia Railway & Power Company were merged into the Georgia Power Company under a charter granted by the Secretary of the State of Georgia, under Section 2607 of the Civil Code of Georgia that,—"all franchises originally granted separate companies were consolidated and merged into one franchise," erred in thereafter holding in said decision that the five-cent rate of fare franchise between one of said appellants and the City of Decatur was "still in force" and that losses attributable thereto were "immaterial" to the determination of the validity and constitutionality of said legislative acts and the improvement assessments made thereunder "while the rate contract continues." Said holding of the State court was violative of the Fourteenth Amendment of the Constitution of the United States for that it resulted in confiscation of appellants' property and deprived them of their property without due process of law and the said holding is assigned as error upon the following grounds, to wit:

(a) The merger of all franchises into one franchise by virtue of a consolidation, as held by said court, terminated the separate and several franchises of the consolidated companies; and it was unreasonable, arbitrary and discriminatory for said Court to hold that all franchises were merged into one, for the purpose of justifying its consideration of all of the appellants' property, real or personal, street railway or electrical, and wherever situated or possessed, on the question of whether benefits resulted to appellants from the improvement in question, and to thereafter hold that said franchises were not merged into one and that the five-cent fare franchise continued in force, so as to sustain the refusal of the trial court to allow appellants to show a total absence of benefits accruing to their property as a consequence of the improvement in question.

(b) The merger of all franchises into one franchise by virtue of a consolidation, as held by said Court, terminated

the separate and several franchises of the consolidated companies; and it was error for the Court, after so holding, to thereafter hold that the five-cent rate of fare franchise continued in force as a separate and distinct franchise so as to render the proof of losses thereunder immaterial on the question of special benefits, (made the sole basis for sustaining the improvement assessment in question), and so as to place said named franchise in a separate classification from all other franchises of appellants for the purpose, in effect, of denying jurisdiction to the Public Service Commission of the State of Georgia over said five-cent rate of fare franchise.

V.

ARGUMENT AND CITATION OF AUTHORITIES RELIED UPON

For the purpose of argument, the first, second, third and fourth assignments of error will be considered jointly inasmuch as each of these assignments relates to the validity and constitutionality of the legislative acts of the State of Georgia giving to the City of Decatur, the appellee, the right to improve and reimprove its streets and make assessments therefor against street railway companies. While each of these assignments involves a separate and distinct basis of attack upon the acts in question, they are all concerned with the constitutionality of the acts, as construed by the Supreme Court of Georgia, and whether, as thus construed, they denied to the appellants the equal protection of the law and the due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and resulted in confiscation of appellants' property in contravention thereof.

(See pages 8–13 of this Brief and printed record, pages 151 to 155.)

1. Question of the Constitutionality of the Statutes of Georgia: Georgia Laws 1919, Page 934 et seq., And Georgia Laws 1924, Page 534 et seq.

This Court is asked to pass upon the constitutionality of the Acts of the Georgia Legislature (Ga. Laws 1919, pp. 934 et seq. and Ga. Laws 1924, pp. 534 et seq.), as construed and enforced against appellants. Said acts are amendments to the municipal charter of the City of Decatur, both Acts being substantially the same.

The pertinent part of said Acts provides that the City of Decatur, in the County of DeKalb, "shall have full power and authority, in their discretion, as hereinafter prescribed, to grade, regrade, pave, repave, build, rebuild and otherwise improve or reimprove any of the streets, alleys, lanes, squares or public places of said City now laid out and constructed. In order to make effective the power and authority above given and to provide funds therefor, said commissioners shall have full power and authority to assess the actual cost of such improvements above provided on the real estate abutting on any street, alley, lane, square or public place where improved, one-half (½) of the cost of such improvement shall be assessed against the real estate abutting on one side of the street, alley, lane, square or public place where improved, and one-half (½) of the cost of such improvement shall be assessed against the real estate abutting on the other side of such street, alley, lane, square or public place where improved; and any street railroad company or other railroad company having a track or tracks running along or across the streets, alleys, lanes, squares or public places of said city where so improved shall be required to pay the actual cost in full of grading, regrading, paving, repaving, building, rebuilding and otherwise improving or reimproving such street, alley, lane, square or public place between their tracks and for two (2) feet on each side thereof and in such cases and on such streets,

alleys, lanes, squares or public places where such assessments are made against such street railroad company or other railroad company, the remaining cost of such improvement shall be assessed against the real estate abutting on the street, alley, lane, square or public place where so improved, one-half (½) of such cost shall be assessed against the real estate abutting on one side of such street, alley, lane, square or public place where so improved, and the other one-half (½) of said cost shall be assessed against the real estate abutting on the other side thereof; provided that no grading, regrading, paving, repaving, building, rebuilding, or otherwise improving or reimproving any street, alley, lane, square or public place in said city and no assessments made, under the authority, power and provisions of this section shall be made unless provided for by ordinance, such ordinance to provide for doing the work, and notice of the introduction of which shall be published in some newspaper of said city, and if there is no newspaper published therein, then in some newspaper having a general circulation in said city, one time at least ten (10) days before the adoption of said ordinance, so that any person interested in said improvement may file his objection thereto with the city clerk and be heard by the commissioners. Said notice shall contain a statement of the street, alley, lane, square or public place to be improved or the part to be improved and the kind of improvements to be made, the date of the meeting of the commissioners at which said ordinance will be considered for adoption, and the same may be adopted at said meeting or some subsequent meeting, in the discretion of the commissioners, after such notice has been given. The amount of the assessment on each piece of real estate abutting on the street, alley, lane, square or public place where such improvements have been made shall be a lien on the real estate, such lien dating from the time of the passage of the ordinance making the assessment; and the amount of the assessment for such improvement against said street railroad company or other railroad com-

pany and against the property thereof shall be a lien against such railroad company and against the property thereof, dating from the time of the passage of the ordinance making the assessment. The said ordinance making the assessment against the abutting real estate and against such railroad company and the property thereof shall be made by the commissioners of said city after the completion of such improvements and when the cost thereof shall have been determined; and when the commissioners of said city have levied and assessed the cost of such improvement against the abutting real estate and against such street railroad company or other railroad company and against the property thereof, as above provided, they shall have full power and authority to enforce the collection of the amount of any such assessment so made for such improvement, by execution to be issued by the clerk of said city, against said abutting real estate and the owner thereof at the time of making the assessment and in accordance with such assessments, when the same is against such real estate; and against said street railroad company or other railroad company and against the property thereof when the same is against such railroad company and such property. Such executions shall be levied by the marshal of said city and after advertising and other proceedings, as in the case of sale of realty for city taxes, such property so levied upon, whether the same be abutting real estate or property of such railroad company or companies, may be sold by the marshal of said city at public outcry to the highest bidder, and such sale shall vest absolute title to such property in the purchaser; * * *. The lien for the assessment on abutting property and on street railroad or other railroad companies for making street improvements as heretofore provided shall have rank and priority of payment next in point of dignity to liens for taxes."

The said Acts as construed and enforced against appellants, are attacked as unconstitutional and violative of the

equal protection of law clause and the due process of law provision of the 14th Amendment to the Constitution of the United States.

The Constitution of the State of Georgia, Article VII, Section 2, Paragraph One (Ga. Code Section 6553) provides that:

> "All taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed, * * * and shall be levied under general laws."

The special assessment involved in the case at bar does not fall under this classification.

In *Georgia Railroad and Banking Co. v. Town of Decatur*, 137 Ga. 537, 540, the Supreme Court of the State of Georgia held:

> "Though assessments for local improvements are not taxes within the meaning of the requirement of the constitution that taxes must be ad valorem and uniform, nevertheless assessments for local improvements, such as street paving and sewerage, are an exercise of the taxing power."

For similar decisions, see:

City of Brunswick v. Gordon Realty Co., 163 Ga. 536, 641, 642.

United Railways & Elec. Co. v. Mayor of Baltimore, 127 Md. 660; 96 Atl. 880.

Assessments for local improvements in Georgia are and can be sustained only when the benefits equal the assessment. The benefits must represent the enhancement in value of the property, produced by the construction of the improvement. Such improvements must result in some special advantage to the owners in which the general public does not participate and can not be levied for any amount in excess of the benefits received by the owner from the improvement.

Hayden v. City of Atlanta, 70 Ga. 817, 823;

Brumby v. Harris, 107 Ga. 257, 258–259;

Mayor & Aldermen of Savannah v. Knight, 172 Ga. 371, 374–375;

Holt v. City of LaGrange, 175 Ga. 402, 404.

(A).

While the decision in the case at bar recognizes and states the necessity of benefits in order to sustain improvement assessments, the statutes in question are so construed and enforced against appellants as to deny them the equal protection of law and the due process of law accorded to all other property owners.

In Georgia, as against all property owners other than street railway companies and appellants special assessments are and must be imposed on the real property benefited, and executions issued therefor do not run generally against the other property of the owner not situated upon nor specially benefited by the improvement.

Hayden v. City of Atlanta, 70 Ga. 817, 823;

Brumby v. Harris, 107 Ga. 257, 258–259.

The great weight of authority holds that statutes which attempt to impose personal liability for special assessments are unconstitutional and violative of the due process of law clause of the Constitution of the United States.

Asbary v. Roanoke, 91 Va. 562; 42 L. R. A. 636;

Virginia v. Hall, 96 Ill. 278;

Hoover v. People, 171 Ill. 182; 49 N. E. 367;

Gage v. Chicago, 225 Ill. 218; 80 N. E. 127;

City of Brookline v. Natwick, 22 S. D. 322, 117 N. W. 376;

Meyer v. Covington, 103 Ky. 546; 45 S. W. 769;

Woodward v. Collett, 20 Ky. L. Rep. 1006; 48 S. W. 164;

Barber v. Southern Constr. Co., 20 Ky. L. Rep. 796; 47 S. W. 608;

Neenan v. Smith, 50 Mo. 525, overruling the former Missouri case of St. Louis v. Grubbs, 80 Mo. App. 433.

Heman Constr. Co. v. Levy, 179 Mo. 455, 78 S. W. 613;

Taylor v. Palmer, 31 Cal. 241;

Page v. W. W. Case Company, 145 Cal. 578; 79 Pac. 278;

Holley v. Peace, 110 N. C. 32; 17 L. R. A. 330;

Elliott on Roads & Streets, 3rd Ed. Vol. 2, Sec. 707.

44 Corpus Juris, "Municipal Corporations" Page 877, Section 3586 and cases collected and cited in Note 81.

The legislative acts in question are construed as not creating any personal liability against property owners other than street railway owners. However, as against appellants and street railway companies it is held that the Acts not only created a personal liability against appellants but also a blanket lien against all of their property, real and personal, wherever located, without regard to whether such property was or was not benefited.

In thus treating appellants differently from all other property owners the Acts in question are so construed as to deny them the equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States. It is no reply to such discrimination to say that some of the property of railway companies can not be levied upon and sold without special legislative authority. The Legislature can create the same kind of lien upon railway property, specially benefited, and authorize the issuance and enforce-

ment of executions against such property in the same or like manner as is done with reference to property of others specially benefited.

In other and more serious respects the Acts in question, as construed and enforced against appellants, deny them the due process of law and the equal protection of law accorded other property owners.

This court has repeatedly held that an improvement assessment which substantially exceeds the benefits conferred is not taxation but unconstitutional confiscation.

Norwood v. Baker, 172 U. S. 269;

Standard Pipe Line Co. v. Miller Co. Hwy Bridge Dist., 277 U. S. 160,162.

Road Improvement Dist. No. 1 of Ark. v. Missouri Pac. R. Co., 274 U. S. 188.

Street railway companies are entitled to the same constitutional protection accorded to others.

44 Corpus Juris, "Municipal Corporations" page 534, Section 2896.

Road Imp. Dist. No. 1 of Ark. v. Missouri Pac. R. Co., 274 U. S. 188.

City of Commerce v. Southern Ry. Co., 35 Fed (2d) 331.

Road Improvement Dist. No. 1 of Franklin Co. Ark. v. Missouri Pac. R. Co., 2 Fed. (2d) 340; 341.

City of Barree v. Barree Chelsa R. R. Co., 123 Atl. 427.

United Railway & Elec. Co. v. Mayor of Baltimore, 127 Md. 660.

In the case at bar appellants, by demurrer (Record, Pages 38-41) and by their answer (Record, Pages 20-34), pleaded the lack of benefits from the improvement in question.

Appellants offered to establish such facts by both docu-

mentary and oral testimony. (Record, Pages 99-107). The trial court and the Supreme Court of the State of Georgia construed and enforced the statutes in question so as to deny appellants the right to introduce evidence which would have established an absence of benefits from the improvement. (Record, Pages 146-147). The assessment in question vastly exceeded all benefits (if any) which appellants or appellants' property could receive from the improvement in question, therefore the enforcement of such improvement assessment unconstitutionally confiscated appellants' property.

Standard Pipe Line Co. v. Wilkes County Highway Bridge Dist., 277 U. S. 160; 162.

Road Improvement Dist. No. 1 of Ark. v. Missouri Pac. R. Co., 274 U. S. 188.

Norwood v. Baker, 172 U. S. 269.

Carolina & N. W. R. Co. v. Town of Clover, 46 Fed. (2d) 395.

City of San Diego v. Atkinson, Topeka & Santa Fe Ry. Co., 45 Fed. (2d) 11.

City of Commerce v. Southern Ry. Co., 35 Fed. (2d) 331.

Road Improvement Dist. No. 1 v. Missouri Pac. R. Co., 2 Fed. (2d) 340.

Since appellants were denied the right to introduce any evidence or testimony to establish a lack of benefits, they were denied the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Saunders v. Shaw, 244 U. S. 317;

Sneider v. Massachusetts, 291 U. S. 128;

Bandini Petroleum Co. v. Superior Court, 284 U. S. 8, 19.

Not only were appellants denied due process of law in the case at bar but they were also denied the equal protection of the law.

As against all other property owners improvement assessments under the statutes in question are based solely upon real estate. (See cases on Page 23 of this brief.) As against street railway companies (appellants) the improvement assessments are based upon personal property as well as real property.

The Supreme Court of the State of Georgia in its opinion held that appellants were operating in the City of Decatur an electric light and power business, and that "the city authorities in causing the paving and making the assessment may very well have considered in determining the benefit to be derived therefrom the value of the whole property and not merely one branch of the service."

(Printed record, page 144.)

The statutes in question are construed as basing an improvement assessment against street railway companies upon personal as well as real property, whereas against all other parties such assessments are confined to real property alone.

In *Road Improvement District No. 1 v. Missouri Pac. Ry. Co.*, 274 U. S. 188, 192, 194, this court held that such distinction in computing and enforcing an assessment constitutes an unreasonable discrimination. On Page 194, this court held:

> "Our conclusion is that the assessment against the railroad is unreasonably discriminatory in so far as it is based on personal property, and in this respect violates the equal protection clause of the 14th Amendment and that it is otherwise so excessive as to be a manifestly arbitrary exaction and in violation of the due process of law clause of the same amendment."

Another and an additional unreasonable and unconstitutional discrimination arises from the different effect which the legislative presumption of benefits is given as applied to other owners of property, and as applied to appellants.

As against all other property owners except appellants it is held that the legislative presumption of benefits is rebutted and a prima facie case of confiscation is established by showing that the entire value of the property specially benefited will be required to pay the assessment.

Holst v. City of LaGrange, 175 Ga. 402, 404.

A tender of such property is evidentiary, if not conclusive evidence, of an absence of benefits.

In appellants' answer they offered and tendered to the City of Decatur all of the street railway property and street railway lines owned and operated within the territorial limits of the City of Decatur, together with the franchises under which they were constructed and operated. (See Pages 23 and 24 of the printed record.) See also opinion of the Supreme Court of the State of Georgia on Page 136 of printed record.

The court did not permit appellants to introduce evidence to sustain its contentions in this respect. (See printed Record, Pages 99–107.)

The Supreme Court held that the admission of such evidence was immaterial to a consideration of the case. (See printed Record, Pages 146, 147.) In the body of the court's opinion, the court held: "To rebut this presumption the defendant offered to surrender and tender to the city their street railway franchises and property." (See Page 143 of the printed Record.) The Supreme Court then held that the tender did not go far enough, but that for appellants to rebut the legislative presumption of benefits, they would have to tender all of their property, both real and personal, including electric light and power property and business, as well as street railway franchises and property.

As Against Appellants, the Legislative Presumption of Benefits was held to be Conclusive and Prevented Appellants From Introducing Evidence and Testimony Showing a Lack of Benefits. The Supreme Court of Georgia held:

> "The power of determining the benefits to be received by the property of the street railway company from local improvements is a legislative one; and in this case, by virtue of the charter of the City of Decatur, that authority was vested solely in the commissioners of said city, who in the exercise of said authority, have determined the same."
>
> (See Page 139 of the printed record.)

The action of a municipality is not conclusive on the question of benefits; they must be determined upon evidence and not solely by virtue of legislative enactments or municipal ordinances.

Norwood v. Baker, 172 U. S. 269;

Standard Pipe Line Co. v. Miller County Hwy. Bridge Dist., 277 U. S. 160, 162.

Road Improvement Dist. No. 1 of Ark. v. Missouri Pac. R. Co., 274 U. S. 188.

Road Improvement Dist. No. 1 of Franklin County, Ark. v. Missouri Pac. R. Co., 2 Fed (2d) 340.

City of Commerce v. Southern Ry. Co., 35 Fed (2d) 331.

C. & N. W. Ry. Co. v. Town of Clover, S. C., 46 Fed (2d) 395.

Immediately following the above quotation from the opinion of the Supreme Court of the State of Georgia, the Court said:

> "The question of benefits * * * will not be inquired into by the courts unless it is made to appear that there has been an arbitrary abuse of such authority."
>
> (Printed record, page 139.)

Under the authorities just heretofore cited, unconstitutional confiscation is shown by evidence that the improvement assessment exceeds the benefits, and it is not necessary to prove "arbitrary abuse of authority."

In the case at bar the improvement statutes in question were so construed as to deprive appellants of the right to establish by evidence an entire absence of benefits.

(See printed record, pages 99–107.)

In *Bandini v. Superior Court*, 284 U. S. 8, 19, this court held that the legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense. (See cases there cited.)

The refusal to allow appellants to introduce any evidence whatever to establish an entire absence of benefits renders the so called legislative presumption of benefits an absolute and conclusive one.

We respectfully submit that it is idle to designate a presumption as one which can be rebutted and then deny a party the right to disprove such presumption by evidence.

2. Constitutionality of Assessment Statutes Not Decided in Previous Cases.

The fifth assignment of error, to which attention is now directed, is heretofore set out on page 13 of this brief. (See also Page 155 of the printed record.)

In the decision of the Supreme Court of the State of Georgia, the court held that the question of no benefit, that the paving assessment was confiscatory, and other questions as to the legality of the assessment had been raised and decided in previous Georgia decisions, affirmed on review by this court.

(See Pages 144 and 145 of the printed record.)

Such holding was erroneous for in no previous decision had the Supreme court of the State of Georgia or this Court

rendered any binding decision with reference to the constitutionality of the improvement statutes or of the improvement assessment in question.

In the case of *Georgia Rwy. & Power Co. v. Town of Decatur*, 152 Ga. 143; 153 Ga. 329; 262 U. S. 432, the only question involved was the validity of a certain municipal rate franchise or contract. The question of the constitutionality of the improvement assessment statutes and the improvement assessment in question was neither raised nor decided. In fact, those cases arose prior to the enactment of the said improvement assessment statutes.

The case of *Georgia Power Co. v. City of Decatur*, 168 Ga. 705; 281 U. S. 505, did not raise the question of the constitutionality of the improvement assessment statutes or the improvement assessment in question. The only question raised and passed upon in that case was whether a certain municipal rate franchise or contract had terminated at the time of the expiration of the charter of the company to which the franchise was originally granted and whether such franchise or contract was still in force.

The decision of the Supreme Court of the State of Georgia in the case of *Georgia Power Company v. Decatur*, 170 Ga. 699, was in favor of appellants. In the opinions written in said case the Judges expressed divergent views with reference to the improvement assessment statutes, but such divergent views (as held by the Supreme Court of the State of Georgia in *Georgia Power Co. v. Decatur*, 173 Ga. 219) were not the judgment of the court; the only judgment of the court being one in favor of appellants.

The decision of the Supreme Court of the State of Georgia in the case of *Georgia Power Company v. City of Decatur*, 173 Ga. 219, was in favor of appellants.

In no previous decision (other than the one rendered in the instant case and now sought to be reviewed) has the Supreme Court of the State of Georgia rendered any final

or binding decision with reference to the constitutionality of the improvement statutes or the improvement assessment in question.

Under the statutes, rules and decisions of this court, the decision of the Supreme Court of the State of Georgia, now brought to this Court for review, is the only final decision involving the constitutionality of the improvement assessment statutes and the improvement assessment in question which could have been brought to this Court for review.

(See, *Georgia Railway & Power Co. v. Decatur*, 262 U. S. 432; Pages 436-437.)

3. State Court Erred in Holding That Appellants Had Failed to Overcome Presumption of Benefits in View of Court's Ruling That Exclusion of Appellant's Evidence on That Question was Proper.

The sixth assignment of error, now to be discussed, is set out on Page 14 of this brief, and also on Page 156 of the printed record.

It was error for the Supreme Court of the State of Georgia to hold that appellants did not show that the street railway franchise and property thereunder was the whole franchise and property held and operated by appellants in connection with their street railway and power business in the city; that they failed to show that they were not also operating in connection with the street railway business an electric light and power business in the city, and, hence; the evidence of appellants was insufficient to overcome the legal presumption in favor of the assessment.

(Pages 143–144 of the printed record.)

In the petition brought by Appellee against Appellants, the City of Decatur did not allege nor contend that the

power business and property of appellants was owned and operated in connection with their street railway property and business.

The street railway property and franchises and the electric light and power property and business were first constructed, owned and operated by entirely separate and distinct companies. The different franchises were acquired by separate and distinct companies. The two distinct classes of business (street railway business and the electric light and power business) have been operated separately and distinctly, one from the other. In the trial court, appellants offered evidence to show the above facts and also offered in evidence the municipal franchise under and by virtue of which the street railway lines and property in Decatur were constructed and being operated.

(See printed record, pages 85–93.)

Upon the objection of appellee the trial court denied appellants the right to introduce such evidence, holding that the same was irrelevant and immaterial.

(See printed record, pages 85 and 93.)

The Supreme Court of the State of Georgia affirmed this ruling of the trial court.

(See pages 146 and 147 of the printed record.)

It is respectfully submitted that it was error for the Supreme Court of Georgia to uphold the exclusion of such evidence as being irrelevant, and then hold that appellants *had failed* to overcome the legal presumption in favor of the assessment by omitting to introduce the very evidence which they (the appellants) had sought to introduce and which had been thus excluded.

The fact that separate and distinct companies, owning separate and distinct property and franchises, were merged or consolidated into another company did not convert

separate and distinct municipal franchises and separate and distinct businesses and classifications of business into one franchise and one business.

Blair v. Chicago, 201 U. S. 400;

Cleveland Elec. R. Co. v. Cleveland, 204 U. S. 116;

Detroit U. R. Co. v. Detroit, 229 U. S. 39.

(See also what is said hereafter on this question in discussing the eighth and ninth assignments of error.)

4. Exclusion of Appellants' Evidence Showing Absence of Benefits Constituted Denial of Due Process of Law.

The seventh assignment of error is set out on Page 15 of this brief. See also Pages 156–157 of the printed record.

The trial court excluded all of the evidence offered and tendered by appellants. The excluded evidence would have established: (a) That the street railway franchise and property was separate and distinct from the electric light and power business. (See Pages 85–93 of printed record.) (b) That appellants and appellants' property received no benefit from the improvement for which the assessment in question was made.

(Printed record, pages 105–107.)

This denial to appellants of their right to introduce evidence establishing their defense denied appellants the due process of law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

Saunders v. Shaw, 244 U. S. 317;

Sneider v. Massachusetts, 291 U. S. 97, 128;

Bandini Petroleum Co., v. Superior Court, 284 U. S. 8, 19.

5. State Court's Holding That Merger of Companies Resulted in Merger of Franchises Erroneous and also Inconsistent with Other Holdings.

The eighth and ninth assignments of error are set out on Page 15 and Page 16 of this Brief. See also Pages 157–159 of printed transcript of record.

As pointed out under the sixth assignment of error, the consolidation or merger of various companies into another company, does not cause all franchises originally granted separate companies to be "consolidated and merged into one franchise." The consolidation of various companies into another company does not and can not change or alter the various separate and distinct municipal franchises. If the consolidation or merger of various companies into another Company merges all of the separate and distinct franchises "into one franchise," into which one or particular franchise are they merged? The various municipal franchises may have been granted for different periods of time and upon entirely different and distinct terms and conditions.

The municipal rate ordinance of the City of Decatur was held by this Court (Georgia Power Co. v. City of Decatur, 262 U. S. 432, 439), to be a separate classification from other municipal franchises (the others being under the jurisdiction of the Georgia Public Service Commission). If the consolidation and merger of companies merges all franchises "into one franchise," under which classification does the one franchise thereafter exist? If they are all merged into one, a separate classification can no longer exist as to one of them.

It was error for the Supreme Court of the State of Georgia to hold that the consolidation of various separate companies into one company merged *all* franchises *into one franchise*, and then hold that the municipal five-cent rate of fare franchise continued in force as a separate and distinct franchise and as a separate classification from all other franchises. It

is respectfully submitted that such holdings are contradictory and one of them is erroneous.

6. Improvement Assessment Invalid as Blanket Lien on Appellants' Property "Wherever Located."

In addition to holding that all of the franchises of the company had been consolidated into one franchise, the court held that the improvement assessment in question was a blanket lien against appellants and their property "wherever located," whether within or beyond the municipal limits of Decatur, from the time of the ordinance making the assessment.

(See Pages 125–126 of printed record.)

Such construction of the said improvement statutes gave the municipality the right to impose an improvement assessment upon property located beyond and outside of its territorial jurisdiction, in fact, upon property located anywhere within the State of Georgia.

A tax levied upon an entire property, part of which is without the jurisdiction of the taxing body, is invalid.

Cooley, "Taxation" 4th Edition, Vol. 1, Section 97.

7. Statutes and Assessment In Question Not Within Classification of "General Taxation."

The special improvement assessment statutes and the special improvement assessment in question do not fall under the classification of general taxation or the creation of local improvement districts levying general taxes for public pur-

poses. With reference to such taxation the Constitution of the State of Georgia Article, 7, Section 2, Paragraph 1 (Georgia Code Section 6553) provides:

> "All taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

The assessment in question was not made or levied in conformity with such constitutional provision. Hence it was not a general tax, but a special improvement assessment the legality of which must depend upon special benefits to the property assessed.

The principles applied in Norwood v. Baker, 172 U. S. 269, and similar cases, are applicable to the present improvement statutes and the special improvement assessment in question.

* * * *

In Georgia, in equitable as well as legal actions, it is error to direct a verdict where there is any conflict in the evidence. In such cases the issues must be submitted to a jury for their determination.

Colson v. Meyers, 80 Ga. 499 (1);

Webb v. Thompson, 146 Ga. 461;

Fountain v. Hagan Gas Engine & Mfg. Co., 140 Ga. 70 (2);

Bonds v. Brown, 133 Ga. 451 (2).

In the case at bar all of appellants' evidence establishing a lack of benefits from the improvement in question was excluded. A verdict against appellants was directed. Thus appellants were denied the right to establish by evidence

issues raised by their pleadings and have the same passed upon by a jury. This was a denial to appellants of the equal protection of law and the due process of law accorded all other property owners.

Respectfully submitted,

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Attorneys for Appellants.

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Supreme Court of the United States

OCTOBER TERM, 1934

No. 570

THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY,

Appellants,

vs.

CITY OF DECATUR,

Appellee.

REPLY BRIEF OF APPELLANTS, THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY.

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THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY, AND GEORGIA POWER COMPANY,
Appellants,

vs.

CITY OF DECATUR,
Appellee

No. 570
October Term, 1934.
Supreme Court of the United States.

REPLY BRIEF OF APPELLANTS

Appellee cites cases based upon a State's reserved right and power to alter, amend or repeal corporation charters and relies upon cases relating to police regulations or requirements.

The Statutes in question do not fall under either of said classifications.

In *French v. Barber Asphalt Paving Co.*, 181 U. S. 324; 343 344, this Court held:

> "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. * * * Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, * * *"

The decision of the Supreme Court of Georgia, in the case at bar, construes the statute in question as an exercise of the taxing power under which assessments must be based on equivalent benefits.

The Supreme Court of Georgia held:

> "The power of determining the benefits to be received by the property of the railroad company from local improvements is a legislative one; and *in this case*, by virtue of its charter as amended, this authority is vested solely in the city commissioners, who in the exercise of said authority determine the same." (Italics ours.)
>
> (Printed Record, Page 140.)
>
> "There arises, from the Legislative Act of the City in adopting the ordinance for the paving and making the assessment, a presumption that the paving was beneficial to the street railway company."
>
> (Printed Record, Page 143.)
>
> "The city authorities in causing the paving and making the assessment may well have considered *in determining the benefits to be derived therefrom*, the value of the whole property, and not merely the value of one branch of the service." (Italics ours.)
>
> (Printed Record, Page 144.)
>
> (See also cases and authorities cited by appellants in their brief, Pages 22–23.)

RESERVED POWER OF STATE TO AMEND OR REPEAL CHARTER NOT INVOLVED

Although the Supreme Court of Georgia construed the acts in question as being under the classification of an exercise of the taxing power, which must be based upon equivalent benefits, appellee, in its brief, contends that the entire lack of benefits is immaterial because of "the reserved power to alter or amend charters."

(Appellee's Brief, Pages 3–7.)

The legislative acts in question were neither an amendment nor an attempted amendment to appellants' charters:

(a) The Constitution of the State of Georgia, Art. 3, Sec. 7, Par. 18, (Code Section 6446), provides: "General assembly shall have no power to grant corporate powers and privileges to private companies * * *. All corporate powers and privileges to * * * railroad * * companies shall be issued and granted by the Secretary of State in such manner as shall be prescribed by law; and if in any event, the Secretary of State shall be disqualified to act in any case, then in that event the legislature shall provide by general laws by what person such charters shall be granted."

Any amendment to or change in appellants' charter must be made by the Secretary of State under general laws.

(b) The Constitution of the State of Georgia, Art. 1, Sec. 4, Par. 1 (Code Section 6391), provides: "No general law affecting private rights shall be varied in any particular case by special legislation, except with the free consent, in writing, of all persons to be affected thereby * * *."

In *Louisville Gas Co. v. Citizens Gas Co.*, 115 U. S. 683, 697, 698, this court held:

"The clause in that act (referring to a State's reserved power of amendment or repeal) declaring that 'no alteration or amendment to the charter of the gas company shall be made without the consent of the city counsel and the directors of the gas company,' plainly expresses as we think, the intention that the company's charter should not be amended or repealed "at the will of the legislature"."

The charters of appellants could not be changed, modified or affected by the special local acts in question.

(c) The Constitution of the State of Georgia, Art. 3, Sec. 7, Par. 8 (Code Section 6437), provides: "No law or ordinance shall pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof."

The Constitution of the State of Georgia, Art. 3, Sec. 7, Par. 17 (Code Section 6445), provides:

"* * the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made."

The charters of appellants were not referred to either in the title or body of the acts in question.

Cases dealing with the reserved right of the State to amend or repeal corporate charters by enacting general laws are not applicable to the statutes in question for they were not and could not be construed as an amendment or alteration of any of appellants' charters.

CASES DEALING WITH POLICE POWER AND REGULATION ARE NOT APPLICABLE

(a) The acts in question are an exercise of the taxing power; assessments thereunder to be based upon special benefits to particular property.

(b) They are revenue acts and not regulatory acts.

(c) They do not require property owners or street railway companies to construct or make any improvements.

(d) The statutes authorize the commissioners of the municipality (City of Decatur) "to grade, regrade; pave, repave; build, rebuild, or otherwise improve or reimprove any of the streets," etc.

(e) The acts are revenue acts authorizing the city to make improvements and raise funds for the improvements it makes.

(f) The assessments are made a general lien upon property from the time of the passage of the assessment ordinance.

(g) The city clerk is authorized to issue an execution for the amount of the special assessment.

(h) The execution is to be levied "as in the case of sale of realty for city taxes."

(i) The lien for this special tax is given priority next to the lien for general taxes.

In *City of Brunswick v. Gordon Realty Co.*, 163 Georgia 636; 641, the Supreme Court of Georgia held:

> "As the issuance of an execution creates a lien under which the municipal authorities may seize and sell the property improved, it follows further that in doing these acts, that is, in issuing the execution, seizing and selling under it, the municipality exercises the taxing power."

(j) The acts in question are not based upon any claimed police power or authority vested in the municipality. They provide that it is "additional and cumulative to other provisions now in force and in effect in said city."

Moreover, in the case at bar, the Supreme Court, in repeatedly holding that the power of determining the benefits to be received by the railroad companies for the local improvements in question is a legislative one, and that in determining the benefits the city authorities could consider the value of all of the property of appellants, classified the statutes in question as an exercise of the taxing power and not as a police regulation or requirement.

Special attention is called to the case of *United Rwys. & Elec. Co. v. Mayor of Baltimore*, 127 Md. 660; 96 Atl. 880. In that case the exact questions here involved were considered and decided as contended herein by appellants.

CASE AT BAR IS NOT "JUST ANOTHER OFFER ON THEIR (APPELLANTS) PART TO REPUDIATE THEIR CONTRACT"

The assertion made on Page 11 of appellee's brief—"The offer of appellants to surrender their franchise for this particular line and to abandon its operation is just another effort on their part to repudiate their contract,"—is erroneous.

Prior to the passage of the improvement ordinance in question, appellants, in good faith, notified appellee that they and their property would receive no benefits from the contemplated improvement; that the contemplated assessment "would vastly exceed the entire value of the street railway lines located and being operated within the territorial limits of the municipality, taking into consideration all improvements which would or could in any way result from the street paved. As evidentiary of this fact, appellants offered to surrender to the municipality *all* of its street railway lines and franchises located within the municipality of Decatur.

(See Record, Pages 23 and 24.)

When appellee brought suit against appellants to collect the amount of the assessment, appellee pleaded that it could not levy on street railway lines and property in Decatur without special legislative authority. In answer to such allegation appellants tendered appellee the "street railway lines located in the territorial limits of Decatur, together with the franchises under which they were constructed and operated."

(See Record, Pages 23 and 24.)

In answer to the suit brought by appellee against appellants, appellants pleaded "that the special paving assessment sought to be assessed against each of said defendants unconstitutionally confiscates the property of said defendants, for that the cost of said special paving assessment is substantially in excess of any special benefits which have accrued or can accrue to any of said defendants or any of said defendants' property wherever located, and the special paving assessment in question so far exceeds any benefit of any kind or character which defendants, or defendants' property can receive from the paving, so as to make said special paving assessment unjust and confiscatory of the property of defendants in violation of the 14th amendment of the Constitution of the United States."

(Printed Record, Pages 30 and 33.)

To rebut the legislative presumption of benefits, and as evidentiary of the lack of benefits, appellants in their answer, made "a tender and a continuing tender of the entire street railway lines located within the territorial limits of Decatur."

> (Printed Record, Page 28. See Opinion of the Supreme Court of the State of Georgia, Printed Record Page 143.)

In addition to this, appellants offered evidence to establish an entire lack of benefits.

A tax assessment based on special benefits is arbitrary and unconstitutional when there is an entire lack of benefits.

(See Appellants' Brief, Pages 25, 26 and 29.)

In *Duncan v. St. Johns Levy & Drainage Dist.*, 69 Fed. (2d) 242 (3), 345 (3), the U. S. Circuit Court of Appeals, 8th Circuit, held:

> "Any attempt by taxing authorities to impose a burden without a compensating advantage is power arbitrarily exerted, 'amounts to confiscation and violates the due process provision of the Fourteenth Amendment.' Myles Salt Co. v. Iberia Drainage District, 239 U. S. 478, 36 S. Ct. 204, 60 L. Ed. 392."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 570

THE GEORGIA RAILWAY AND ELECTRIC COMPANY, GEORGIA RAILWAY AND POWER COMPANY, and GEORGIA POWER COMPANY

APPELLANTS

vs.

CITY OF DECATUR

APPELLEE

BRIEF OF APPELLEE

I.

Jurisdiction

We are advised by the clerk that the Court reserved the consideration of the question of jurisdiction until the hearing of the case on the merits.

We respectfully submit that the questions involved in the case under the assignment of errors have been so plainly foreclosed by the decisions of this Court that there is now involved no substantial federal question. The questions involved and the decisions referred to will be pointed out in this brief.

The questions raised by the assignment of errors are:

(1) Whether, as construed and enforced by the courts of the State of Georgia, the provisions of the charter of the City of Decatur, as amended by Georgia laws, 1919, page 934, et seq., and Georgia laws, 1924, pages 534, et seq., conferring upon the city the power to improve and pave the streets of said city and to assess against street railway companies, having tracks thereon, the cost of paving and improving the por-

tions of streets occupied by the tracks of such companies and for two feet on each side thereof, are violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, because:

(a) said charter provisions permit assessments for street paving and improvements against street railway companies without regard to any special benefits to their property, in said streets; whereas, as to owners of abutting property, assessments for street paving and improvements must be based upon special benefits to such abutting property, and must not be out of proportion to such special benefits; and,

(b) assessments against street railway companies under said charter provisions are *in personam* and enforceable against all property of such companies, whereas such assessments as against abutting real estate are *in rem* and are enforceable solely against such abutting real estate.

(2) Whether the rulings of the state courts rejecting, as irrelevant, evidence offered by appellants tending to show the absence of special benefits to the property of appellants from the paving of the street, for which the assessment was levied, amounted to a denial to appellants of due process of law and the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

(3) Whether the ruling of the state courts rejecting, as irrelevant, evidence tending to show that the particular street car line of appellants operated over tracks occupying a portion of the street, for the pavement and improvement of which the assessment was levied, was unprofitable for operation and could not be made profitable for the reason that the rate of fare—fixed by contract for that particular line (R. 87)—was so low as not to permit of its being operated at a profit, amounted to a denial to appellants of due process of law and the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

(4) Whether the ruling of the state courts rejecting, as irrelevant, evidence to the effect that the appellants had of-

fered to surrender to the City of Decatur the franchise for the operation of the particular street car line operated over the street, for the pavement of which the assessment was levied, and to abandon the operation of that line; denied to the appellants due process of law and the equal protection of the law in violation of the Fourteenth Amendment.

ARGUMENT AND CITATION OF AUTHORITIES RELIED ON

I.

The Rule That Assessments Must Be Based Upon Special Benefits Is Not Applicable to Street Railways Occupying Streets.

The general rule that assessments against abutting owners for street improvements are sustainable only to the extent of special benefits to abutting property is not applicable to street railway companies having tracks in the street improved. As to the latter such assessments may be made under the reserved power to alter or amend charters; and, in Georgia, under the express provisions of the law (Georgia code, section 2600) under which street railway companies are chartered and are permitted to construct their railways within towns or cities.

It is well settled by the decisions of this Court that assessments against street railway companies for street improvements, in respect of streets occupied by their tracks, are sustainable, not upon the theory of special benefits to their property (as in the case of abutting owners), but upon the principle that the state has the power to make reasonable classifications, and to impose different burdens upon different classes, and the power to alter or amend corporate charters.

Fort Smith Light & Traction Company v. Board of Improvement of Paving District No. 16 of Fort Smith, 274 U. S. 387;

Fairhaven & Westville Railroad Company v. City of New Haven, 203 U. S. 379;

Sioux City Street Railway Company v. Sioux City, 138 U. S. 98;

Durham Public Service Company v. City of Durham, 261 U. S. 149.

In Georgia, the power is reserved to the State to withdraw, alter, or amend private charters.

Atlantic & Gulf Railroad Company v. State of Georgia, 98 U. S. 359;

West End & Atlanta Street Railroad Company v. Atlanta Street Railroad Company, 49 Ga. 151 (6 and 7);

Georgia code, 1926, *section* 2159, provides:

> "Persons are either natural or artificial. The latter are the creatures of the law, and, except so far as the law forbids it, subject to be changed, modified, or destroyed, at the will of their creator; they are called corporations."

Georgia code, section 2239, provides:

> "In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter."

Georgia code, section 2600, provides that:

> "No street-railroad incorporated under this division shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities: And provided further, that all such street-railroad companies incorporated under this division shall be subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them from time to time."

(This entire section is set out as an appendix to this brief.)

This Court in **Fort Smith Light & Traction Company v. Board of Improvement of Paving District No. 16 of Fort Smith, supra,** held:

> "Constitutional power reserved to the legislature to alter any corporate charter permits the imposition upon a street railway company of the cost of street paving without violating the constitutional provision against impairing the obligation of contracts, although the provision was not in its franchise contract. (Headnote 2.)
>
> "The imposition upon a street railway company of the cost of street paving which its franchise contract does not require it to meet does not unconstitutionally deprive it of property without due process of law, since it might have been included in the original charter, and has a reasonable relation to the object of the grant and the duty of the state to maintain its highways." (Headnote 3.)

In **Fair Haven & Westville Railroad Company v. City of New Haven, supra,** this Court held:

> "The imposition upon street railway companies by Conn. act of July 1, 1895, of the cost of paving and repaving that part of the streets occupied by their tracks, is a valid exercise of the power reserved by the state to alter or amend the charter of a street railway company, which required such company to keep the street between its tracks and 2 feet on each side in good and sufficient repair." (Headnote 2.)

In the opinion of Mr. Justice McKenna, it was said:

> "Does the change and increase of burden upon the plaintiff in error come within the limitations upon the reserved power of the state? Has it no proper relation to the objects of the grant to the company or any of the public rights of the state? Can it be said to be exercised in mere oppression

> and wrong? All of these questions must be answered in the negative. The company was given the right to occupy the streets. It exercised this right first with a single track, and afterwards with a double track. Before granting this right the state certainly could have, and reasonably could have, put upon the company the duty of paving as well as of repairing. Such requirement would have been consistent with the object of the grant. It is yet consistent with the object of the grant. It is not imposed in sheer oppression and wrong, and the good faith of the state cannot be questioned. It is imposed in the exercise of one of the public rights of the state,—the establishment, maintenance, and care of its highways." (Pages 389, 390.)

In **Sioux City Street Railway Company v. Sioux City, supra,** this Court held that under the provisions of the Iowa code:

> "the legislature has power to repeal and amend the articles of incorporation of a company, and to impose any conditions upon the enjoyment of its franchise which the General Assembly may deem necessary for the public good." (Headnote 1.)

In the opinion of Mr. Justice Blatchford on this subject, it was said:

> "The Company took its franchise subject to such legislation as the State might enact. This is plain from the provision of section 1090 of the Code. The Company took its charter subject to the provisions of that section. The General Assembly deemed it necessary for the public good to require street railways to pay for the paving of one foot outside of the tracks, probably upon the view that it was right that they should be required to pave that part of the street which they used almost exclusively. It was

not in the power of the City, by any contract with the Company, to deprive the Legislature of the power of taxing the Company. * * *

"Under section 1090 of the Iowa Code, the Legislature had the power not only to repeal and amend the articles of incorporation of the Company, but to impose any conditions upon the enjoyment of its franchise which the General Assembly might deem necessary for the public good. The reservation of this power was a condition of the grant." (Pages 106, 107.)

II.

No Unfair Discrimination Against Appellants

It is not unfair discrimination against a street railway company, which occupies with its tracks a portion of a street, to require such company to pay a fair portion of the cost of paving such street, although there is no immediate or direct benefit to its property on such street from such improvement, and although assessments against abutting property owners must be based upon special benefits to such abutting property.

Durham Public Service Company v. City of Durham, 261 U. S. 149.

The provision of the Georgia Constitution (Georgia code, section 6553) requiring uniformity of taxation is not applicable to special assessments for local improvements.

"Such assessments are not taxes within the meaning of the constitution."

Hayden v. City of Atlanta, 70 Ga. 817;

Speer v. Mayor and Council of Athens, 85 Ga. 49.

The contention that there is unjust discrimination as against the appellants because assessments for street improvements as against abutting property are *in rem* and are sustainable only where there are corresponding special benefits, whereas, under the provisions of the charter and ordinances of the City

of Decatur, the assessments against appellants are *in personam* and not based upon any immediate, or special, benefits to the property of appellants, is obviously unsound. This contention is completely answered by the decision of this Court in **Durham Public Service Company v. City of Durham, supra,** where it was held that:

> "The power of the legislature to make reasonable classifications and to impose a different burden upon the several classes cannot be denied. There are obvious reasons for imposing peculiar obligations upon a railway in respect of streets occupied by its tracks." (page 154).

In that case the abutting property was valued at more than $5,000,000.00 and the assessments against the owners thereof amounted to approximately $89,000.00; whereas the entire value of the street railroad upon the street improved was $100,000.00 and the assessment against the street railroad company was $102,000.00.

The contention that there is unjust discrimination as against the appellants because the charter provision, as construed by the Georgia courts, makes the assessment as against the appellants a general charge against all their property, whereas as to abutting property owners the assessments are *in rem* against the abutting property only, is answered by the decision of the Supreme Court of Georgia holding that the property of the appellants is not subject to levy and sale.

> *Georgia Power Company v. City of Decatur,* 173 Ga. 219 (2).

As stated by Judge Bell in the case of *Georgia Railway & Electric Company v. Town of Decatur,* 29 Ga. App. 653:

> "A construction of the act as applicable only to a levy and sale of the property of the railway company abutting upon or contiguous to the improvement would be the equivalent of holding it meaningless or ineffective." (Headnote 4.)

Clearly, the enforcement of the assessment against the appellants could not be accomplished by the same method as that prescribed as to abutting property. Even if the law permitted a segment of the track to be levied upon and sold, it is hardly likely that it would bring the amount of the assessment.

The Supreme Court of Alabama, in *Alabama Traction Company v. Selma Trust & Savings Bank*, 104 So. 517, in discussing this question, said:

> "But the statute recognizes the street railway track is not an abutting property assessable for special benefits thereto. The railway company has no abutting property in that sense. Moreover, it recognizes the general policy forbidding the enforcement of liens against a segment of a track or other items of property devoted to public use tending to disconnect or dismantle the plant and prevent the performance of public duty."

The court further said:

> "The cost of paving the street railway is declared a personal obligation of the company, a condition upon its right to have and enjoy a franchise. The lien is declared upon the entire property as security for this tax or demand."

In *44 C. J. 877, section 3585,* the law is stated as follows:

> "When the property assessed is that of a railroad company and essential to the operation of the road, it will not be ordered sold to satisfy the lien (assessment lien), but the court will award a personal judgment to be collected as an ordinary judgment at law."

III.

The Evidence Offered by Appellants, and Rejected by the State Courts, Tending To Show No Direct Benefits, Was Wholly Irrelevant.

The appellants sought to escape the assessment by contending and offering to prove that the particular street car line operated over tracks occupying a portion of the street, for the improvement of which the assessment was made, was unprofitable, and could not be operated at a profit, because of a contract limiting the fare that might be charged. They sought also to show that they had offered to surrender to the City of Decatur the franchise for the operation *of this particular line only* (R. 87), and to abandon its operation. They offered this as evidence of the fact that the amount of the assessment was more than the value of the entire property. It is respectfully submitted that this evidence was not relevant and that there was no denial to the appellants of due process of law or equal protection of the law in excluding the same.

In **Fort Smith Light and Traction Company v. Board of Improvement of Paving District No. 16 of Fort Smith, 274 U. S. 387,** it was held:

> "The imposition of burdens otherwise legitimate upon a public service corporation cannot be held invalid as confiscatory because the permitted rate for its service does not allow an adequate return, and therefore a street railway company cannot avoid payment of a street paving assessment because it loses money in the operation of its road at the rate allowed." (Headnote 4.)

In **Milwaukee Electric Railway & Light Company v. State of Wisconsin, 252 U. S. 100,** it was held:

> "A street railway company's contractual duty to repave that part of a street which lies between its tracks and for 1 foot outside cannot be evaded on

the theory that this additional burden will reduce its income below a reasonable return on the investment." (Headnote 2.)

The rate of fare which appellants are permitted to charge on this particular line is fixed by contract. (R. 87.) This contract is still binding upon the appellants.

Georgia Power Company v. City of Decatur, 281 U. S. 505.

The offer of appellants to surrender their franchise for this particular line and to abandon its operation is just another effort on their part to repudiate their contract—the 5¢ fare contract—with the City of Decatur. They have endeavored in various ways and on various occasions to do this, but the courts have consistently held that they are bound by the contract.

Georgia Railway and Power Company v. Railroad Commission of Georgia, 149 Ga. 1;

Georgia Railway and Power Company v. Town of Decatur, 152 Ga. 143;

Georgia Railway and Power Company v. Town of Decatur, 153 Ga. 329;

Georgia Power Company v. City of Decatur, 168 Ga. 705;

Georgia Railway and Power Company v. Town of Decatur, 262 U. S. 432;

Georgia Power Company v. City of Decatur, 281 U. S. 510.

While under our view of the matter it is immaterial whether appellants proposed to surrender to the City of Decatur "all of its railway property and franchises located within the municipality," as asserted in appellants' brief, on page 6, the record shows that the only proposal along this line was to surrender the franchise for "the particular line" affected by the 5¢ fare contract and remove the tracks of that line (R. 93-101).

Cases and Authorities Relied Upon by Appellants Distinguished.

It is respectfully submitted that none of the authorities relied upon by appellants as supporting their contention that the assessment is invalid because of the lack of special benefits are applicable to this case. We do not dispute the proposition that as to abutting real estate local assessments for street improvements cannot exceed the benefits to the property assessed. All of the cases and authorities cited and relied upon by appellants are to this effect. None of them dealt with a situation similar to the one involved here; that is, where a portion of a public street is occupied by the tracks of a railroad company under a special franchise or permit. The distinction seems to us to be obvious.

Respectfully submitted,

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APPENDIX

Georgia Code, 1926, Section 2600

DIVISION 4

Street-Railroads

Section 2600. *Street Railroads, How Incorporated.*—All the provisions of the preceding division shall govern in the incorporation, control, and management of suburban and street-railroad companies, in so far as the same are applicable and appropriate thereto. Any number of persons, not less than ten, who desire to be incorporated for that purpose, may form a company as provided in the preceding division, with this additional requirement: That they must in their petition specify what city, town, or village, and in what streets thereof, they propose to construct and build said railroad: Provided, that no street-railroad incorporated under this division shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities: And provided further, that all such street-railroad companies incorporated under this division shall be subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them from time to time: And provided further, only such of the powers and franchises that are conferred by said divisions shall belong to said street-railroad companies as shall be necessary and appropriate thereto; and in case any street-railroad incorporated under this division shall be partly located in an incorporated town or city and partly located in the country, then the provisions of the preceding division which apply to other railroads located in the country shall apply to it so far as that portion of its road is concerned: And provided further, that nothing in paragraph 2594 of the preceding division, which provides that the gen-

eral direction and location of railroads sought to be constructed in this State shall be ten miles from a railroad constructed or laid out and selected to be constructed, shall be or be held applicable to electric street, suburban, or interurban railways, or the selection of the route or the construction of the same. Acts 1894, pp. 69, 70; 1903, p. 38.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 570

THE GEORGIA RAILWAY AND ELECTRIC COMPANY, GEORGIA RAILWAY AND POWER COMPANY, and GEORGIA POWER COMPANY

APPELLANTS

vs.

CITY OF DECATUR

APPELLEE

REPLY BRIEF OF APPELLEE

The Provisions of the Georgia Constitution, Referred to in Appellants' Brief, Are Not Applicable.

Appellants in a reply brief contend that the reserved power of the State of Georgia to alter, amend or repeal corporate charters has no applicability to this case for the reason that the Supreme Court of Georgia in deciding the case did not refer to this reserved power, and for the further reason, as contended, that the acts in question (the charter of the City of Decatur as amended by Georgia laws 1919, page 934 et seq., and Georgia laws 1924, page 534 et seq.) were not in terms enacted as amendments to the charters of appellants. In an effort to support this contention, they quote a part of the provision of the Constitution of the State of Georgia (Article I, section 4, paragraph 1) to the effect that

> "No general law affecting private rights shall be varied in any particular case by special legislation, except with the free consent, in writing, of all persons to be affected thereby . . . ."

They argue:

> "The charters of appellants could not be changed, modified or affected by the special local acts in question."

The provision of the constitution of Georgia from which they quote is set out in full as follows:

> "Laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an existing general law. No general law affecting private rights shall be varied in any particular case by special legislation, except with the free consent, in writing, of all persons to be affected thereby; and no person under legal disability to contract is capable of such consent."
>
> *Georgia code, 1926, section 6391.*

It is respectfully submitted that this provision of the constitution of Georgia is in no wise applicable to the case. There was no existing general law governing the subject-matter; that is, the matter of providing for improving and paving streets and assessing the cost thereof; and, therefore, the provision in the above quoted section of the Constitution of Georgia is not applicable. The Supreme Court of Georgia in *Weed v. Mayor and Aldermen of Savannah, 87 Ga. 513,* in dealing with a special act empowering the Mayor and Aldermen of Savannah to improve the streets and levy local assessments therefor, held that this provision of the constitution of Georgia was not applicable to such a special law. In that case, the court said:

> "No provision has ever been made by any general statute of this State as to how municipalities shall cause or require the paving of streets to be done, or other local improvements to be made therein, nor for collecting the cost thereof. An act, therefore, which empowers a particular city to make such improvements, or require the same to be made, and to collect a portion of the cost thereof by assessment upon

> the property abutting on such streets, is not a special law infringing that clause of the constitution first above quoted. This proposition, to our minds, is so clear and plain that simply stating it is sufficient, without argument. Again, there is no general statute of which we are aware exempting the citizens of the cities and towns in this State from the imposition of assessments for improving public streets on which their property abuts; hence, there are no 'private rights' in the nature of such exemption which would be varied by the passage of an act authorizing a particular city to make such improvements in its streets, and to levy assessments therefor. It seems equally clear, therefore, that the acts above mentioned do not vary any 'general law affecting private rights,' and we make the same remark with reference to the second clause of the constitution above quoted as we did concerning the first." (page 514).

As to the contention or intimation of appellants that the charter provisions of the City of Decatur and the amendatory acts may have been passed in violation of the provision of the Constitution of the State of Georgia, Article 3, section 7, paragraph 8 (Georgia code section 6437), which provides that:

> "No law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof."

and the provision in Article 3, section 7, paragraph 17 (Georgia code section 6445), that:

> "The amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alternation to be made,".

we respectfully submit that this question is one for the state court, certainly in the first instance, to pass upon, and the contention has not heretofore been raised or suggested in this case. If it had been, it would unquestionably have been rejected by the Supreme Court of Georgia because the titles of

the acts in question are amply broad to meet the constitutional requirement above referred to. We do not understand that this Court will inquire into the question of whether a state law conflicts with a provision of the state constitution, especially where such question was not raised for decision in the state courts.

Appellants' Franchise Was Expressly Subject to All Assessments and Other Lawful Burdens Imposed from Time to Time.

The franchise under which appellants operate their street railway lines in the City of Decatur was granted by the city and accepted by the appellants, expressly subject to the provision that appellants shall

> "be subject to all just and reasonable rules and regulations of the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them from time to time."

The Constitution of the State of Georgia, Article 3, section 7, paragraph 20 (Georgia code, section 6448) provides:

> "The General Assembly shall not authorize the construction of any street passenger-railway within the limits of any incorporated town or city, without the consent of the corporate authorities."

Georgia laws, 1894, page 69 et seq. (Georgia Code, section 2600), contained the provision that

> "no street-railroad incorporated under this division shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities: And provided further, that all such street-railroad companies incorporated under this division shall be subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them from time to time." (See appendix, page 13 of brief of appellee).

The Georgia Railway & Electric Company was incorporated in 1902. Georgia Railway & Power Company was incorporated in 1911; and the present Georgia Power Company was incorporated in 1930 (R. 124). Therefore, the provisions of the Constitution of Georgia and of Georgia laws 1894, above quoted, are applicable. The Supreme Court of Georgia in *Savannah Railway Company v. Mayor & Aldermen of Savannah, 112 Ga. 164, 167,* in holding that the City of Savannah, Georgia, had the power to levy and collect an occupation or business tax from street railroad companies for the use and occupancy of the city streets by their tracks and cars, based its decision upon the above quoted provision of Georgia laws, contained in Georgia laws of 1894, saying:

> "Admitting for the sake of the argument the soundness of the plaintiff's contention as to the force and effect of the Augusta case, 78 Ga. 119, we would still hold that under the act of 1894 (now section 2180 of the Civil Code) the city authorities had power to levy an occupation or privilege tax upon this plaintiff in error. The record discloses that the company was incorporated under the act just cited. In the act and in the code section is a proviso which declares that all street-railroad companies incorporated thereunder 'shall be subject to all just and reasonable rules and regulations by the corporate authorities and liable for all assessments and other lawful burdens that may be imposed upon them from time to time.' As before remarked, the charter of the city gives it ample power to levy and collect a tax upon the business of street-railroad companies. The tax is therefore within the terms 'assessments and other lawful burdens' imposed upon them."

The provisions of Georgia laws 1894, above referred to, in effect became a part of appellants' franchise.

Sioux City Street Railway Company v. Sioux City, 138 U. S. 98;

Atlantic & Gulf Railroad Company v. State of Georgia, 98 U. S. 359.

The Decision in United Railways & Electric Company v. Mayor & City Council of Baltimore, 122 Md. 660, 96 Atl. 880, Upon Which Appellants Rely, Is Not Applicable on the Questions Now Before the Court.

The decision in that case was expressly based upon the state constitution, the Court of Appeals of Maryland holding that the special assessment there involved was illegal and void because contrary to provisions of the Constitution of the State of Maryland. In deciding the case, the Maryland court expressly refrained from basing its decision upon any provision of the Federal Constitution, saying:

> "In the briefs of the parties, the federal question is exhaustively and ably discussed, and many decisions from the Supreme Court of the United States and elsewhere are cited in support of the conflicting contentions. After the most careful consideration of the case, we do not find it necessary to pass upon the federal question suggested in the briefs, but we rest the decisions solely upon the Constitution and decisions of our court."

The Offer to Surrender the Street Railway Franchise

The Supreme Court of Georgia held that the offer of appellants to split or separate their street railway franchise and property from their electric light and power business and property, and to surrender one branch of their service, the street railway branch, which they contended was unprofitable on account of the five-cent rate contract made with the City, in settlement of the assessment, and at the same time hold to the other branch of the service, their electric light and power franchise and property thereunder, that may be profitable, was not an offer which the City was bound to accept, and did not relieve appellants from their obligation to pay the assessment. This ruling of the state court is supported by the decision of this Court in **Broad River Power Company v. State of South Carolina, 281 U. S. 537 (5)**, where it was held:

"Refusal to permit abandonment of a part of a public utility franchise does not take property without due process of law, although such portion of the franchise has become unprofitable."

We respectfully submit that this is especially true in the present case in view of the fact that the rate which appellants complain of was fixed by contract which they entered into voluntarily and under which they reaped benefits. This contract has been upheld in a number of cases decided by the Supreme Court of Georgia and twice by this Court, as pointed out on page 11 of the original brief of appellee.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 570.—October Term, 1934.

The Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, Appellants,
vs.
City of Decatur.

Appeal from the Supreme Court of the State of Georgia.

[April 29, 1935.]

Mr. Justice Sutherland delivered the opinion of the Court.

The Georgia Railway & Electric Company, which owned and operated street-car lines in the City of Decatur and between that city and other points in the state, leased its property in 1912 to the Georgia Railway & Power Company for the term of 999 years. By the terms of the lease, the latter company bound itself to pay all taxes, rates, charges, licenses, and assessments which might be lawfully imposed and assessed against the property during the continuance of the lease.

By the terms of its charter and a consolidation agreement, the Georgia Power Company in 1927 became possessed of all the rights, franchises, etc., and subject to all the duties, liabilities, debts and obligations, of these two corporations; and thereupon their existence, with certain exceptions, ceased and became merged in the Georgia Power Company as a consolidated corporation.

On May 15, 1925, the City of Decatur, acting under a state statute,[1] ordained that a designated street over which the railway lines extended should be paved as a necessary improvement for travel and drainage; and that the cost of such pavement should be assessed in full against the Railway & Power Company for paving between the tracks and for two feet on each side thereof, the remaining cost to be assessed one-half against the real estate abutting on one side of the street where paved, and the other half against the real estate abutting on the other side. Upon the refusal of each of the three companies to pay the cost assessed for the track

[1]Ga. L. 1919, pp. 934 *et seq.*; Ga. L. 1924, pp. 534 *et seq.*, conferring upon the city power to improve its streets and make assessment for the cost of the improvements against abutting real estate and against any street railway or other railroad company having tracks running along or across such streets.

paving, the city filed a bill in equity against them seeking to recover the amount of the assessment, alleging the absence of all legal remedy.

In the trial court a demurrer to the bill was overruled and a motion to dismiss was denied. The motion to dismiss was based upon the ground, among others, that neither of the defendant companies had received any benefit from the paving, and that the assessment and ordinance were invalid as contravening the due process and equal protection of law clauses of the Fourteenth Amendment of the Federal Constitution. Thereafter, answers were filed, alleging that the assessment vastly exceeded the entire value of the street-railway property and lines located and operated within the city, and offering to surrender them to the city, together with the franchise under which they were constructed and operated, without the necessity of levy or sale; that the only reason why such offer was not accepted was because their entire value was less than the amount of the assessment; that the paving for which the assessment was made did not benefit the lines, property or franchise, but, on the other hand, was a detriment.

Appellants called a witness in support of the contention that their property was not benefited; but upon objection his testimony was excluded. They offered to prove by him that the pavement in question added nothing in value to the street-railway property, but on the contrary was a detriment to its operation; that it made it more difficult and expensive to maintain the track with the pavement than without it; that the railway does not use the pavement in any way; and that it adds nothing in the way of additional travel upon the street cars. The trial court sustained an objection to the offer on the ground "that the question of benefits by virtue of overruling the demurrer to the petition" became irrelevant and immaterial.

At the conclusion of the trial, a decree was rendered against the Georgia Railway & Power Company and the Georgia Power Company for the amount of the paving assessment, with interest, which was affirmed by the state supreme court on appeal. — Ga. —. The ruling of the trial court excluding the evidence offered upon the subject of benefits was sustained on the ground that such evidence was immaterial to the consideration of the question; and the contention of the railway corporations in respect of the violation of the federal Constitution was rejected as being without foundation.

As we read its decision, the court below held that the state statute which authorized, and the ordinance which directed, an assessment for the cost of improvements require, as the basis for their operation, the existence of benefits; and the case was dealt with in that view. The contention of the appellants, as stated by that court, was that the street railway received no benefit from the paving and assessment, and, therefore, there was an arbitrary abuse of legislative authority. But the court held that from the act of the city in adopting the ordinance a presumption arose that the paving was beneficial to the street railway company and the assessment legal. "The burden", it said, "of overcoming this presumption that the action of the city was not an arbitrary abuse of the legislative authority rests upon the plaintiffs in error." The fourth headnote, which as we understand is prepared by the court, reads in part:[2]

"When paving is done and assessment therefor regularly made in the manner provided in the city charter, a presumption arises that the paving and assessment were legal, and casts the burden of proof on one who attacks the assessment on the ground that the same was an arbitrary abuse of the legislative authority, *because of no benefit*, or that it is confiscatory."

In the body of the opinion, there is an excerpt from an earlier decision to the effect that the power to determine benefits to be received by the property of a street-railway company from local improvements is a legislative one; that this power was vested in the commissioners of the city; and that the question of benefits having been determined by the commissioners, could not be inquired into by the courts unless it is made to appear that there has been an arbitrary abuse of the power.

In this court, the city insists that, under Georgia law, "The general rule that assessments against abutting owners for street improvements are sustainable only to the extent of special benefits to abutting property is not applicable to railway companies having tracks in the street improved." And it seeks to sustain the assessment as an exercise of the police power and the alleged power of the state to alter or amend corporate charters. If the Georgia statutes had been thus construed by the state supreme court, a different question would be presented. The difficulty, however, is that the court, as we have said, construed the statute as contemplating the existence of benefits to the railway as a basis for the

[2]The italics are ours.

assessment, but required the railway companies to overcome a legislative presumption that such benefits existed by proof of an arbitrary abuse of the legislative authority "because of no benefit." By that construction we are bound, and in accordance with it must consider and determine the case. The construction becomes part of the statute as much as though it were found in appropriate words in its text. *Morley* v. *Lake Shore Railway Co.*, 146 U. S. 162, 166; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 73; *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32, *et seq.*

Under the statute and ordinance thus construed, if the burden imposed is without any compensating advantage (as appellants offered to show), the arbitrary abuse of the power exercised is plain, *Myles Salt Co.* v. *Iberia Drainage Dist.*, 239 U. S. 478, 485; the assessment amounts to confiscation. *Bush* v. *Branson*, 248 Fed. 377, 380-381. And this doctrine has been fully recognized in Georgia. *Mayor &c. of Savannah* v. *Knight*, 172 Ga. 371, 375. Moreover, the offer of appellants to surrender all their railway property within the city, including the franchise, strongly tended to show that the assessment exceeded the entire value of the property with which the improvement was connected; in which case, as the court below itself has held, there can be no presumption of benefit. *Holst* v. *City of LaGrange*, 175 Ga. 402, 404.

No question is raised as to the competency of the proof which was offered, and evidently there is none. The ruling was simply that it was immaterial. But the existence of benefits resulting from the improvement was material and was deemed so—else why require it, or why create an affirmative presumption in respect of it? Certainly, competent proof tending to overcome a rebuttable presumption of material fact cannot be immaterial; and the refusal of a court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution. *Saunders* v. *Shaw*, 244 U. S. 317, 319; *Bandini Co.* v. *Superior Court*, 284 U. S. 8, 19; *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639, 642; *Zeigler* v. *South & North Ala. R. R. Company*, 58 Ala. 594, 599. Compare *Norwood* v. *Baker*, 172 U. S. 269, 278-279; *Road Dist.* v. *Mo. Pac. R. R. Co.*, 274 U. S. 188; *Standard Pipe Line* v. *Highway Dist.*, 277 U. S 160.

The decree of the court below must be reversed and the cause remanded for further proceedings not inconsistent with the foregoing opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES.

No. 570.—October Term, 1934.

The Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, Appellants,
vs.
City of Decatur.

Appeal from the Supreme Court of the State of Georgia.

[April 29, 1935.]

Mr. Justice Stone.

I think the judgment should be affirmed.

The question is one of state power. Since the Constitution does not deny to the local authorities power to require the paving of appellants' right of way, as a police measure regulating the use of the public streets, see *Durham Public Service Co.* v. *Durham*, 261 U. S. 149; *Fort Smith Light Co.* v. *Paving District*, 274 U. S. 387, it would seem that the mere fact that the state court justified the exercise of the power on different or even untenable grounds would not present to us any substantial federal question.

In any case, the examination of the record makes it plain that the question considered in the opinion of this Court is unsubstantial. Appellant Georgia Power Company, which has taken over the rights and obligations of the other appellants, has a single franchise to supply electric power and to operate a street car line in Decatur and elsewhere, and is subject to a contract requiring it to maintain a five cent fare on its railway. See *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432; *Georgia Power Co.* v. *Decatur*, 281 U. S. 505. In an attempt to establish the arbitrary character of the assessment, appellant offered to prove that the railway could not operate its line in Decatur profitably under its contract for a five cent fare, and that it stood ready to surrender the franchise and discontinue operation. It further offered to show that no benefits were received by the Power Company or by any of its property as

a result of the improvement. This general offer was explained and made specific by the proffered testimony of a witness, rejected as immaterial, that the pavement "added not one cent to the value of the street railway property at all." "On the contrary," in his opinion, "it was a detriment to the street railway operations." Traffic was not increased thereby. Indeed, the pavement would increase the labor and expense of keeping the track in good condition. While the five cent fare continued, the company would be unable to earn the cost of operation. Neither on the argument in this court nor, so far as appears, in any of the courts of Georgia, did the company suggest that it had additional or more persuasive evidence to offer.

Our decisions make it abundantly plain that this evidence, if received, could have no tendency to overcome the presumptive correctness of the legislative finding of benefit. A property owner does not establish want of assessable benefits by showing that a particular public improvement does not aid or facilitate the particular use which he makes of the land. *Miller & Lux* v. *Sacramento Drainage District*, 256 U. S. 129; *Houck* v. *Little River Drainage District*, 239 U. S. 254, 264; *Valley Farms Co.* v. *Westchester County*, 261 U. S. 155, or demonstrate that the assessment is confiscatory by showing that the use which he makes of the land is unprofitable, *Durham Public Service Co.* v. *Durham*, *supra*, 153-155; *Fort Smith Light Co.* v. *Paving District*, *supra*, 390. The earning capacity of the property would seem especially irrelevant where the profit has been limited by the taxpayer's contract, whether entered into improvidently or to gain some collateral advantage.

The offer to surrender the unprofitable street railway, while retaining the profitable electric business, which in this case the Supreme Court of the State ruled were parts of an indivisible franchise, was rightly disregarded as without probative force. The Power Company could not, without the consent of the city, surrender the unprofitable part of its franchise and retain the profitable part. *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 543, 544. The city could not accept the offer without abrogating its contract. Neither the offer nor the refusal to accept it is evidence that the improvement was not of public benefit, which inured to the appellant as a property owner.

The Supreme Court of Georgia did not question the appellant's right to rebut the presumption of validity by evidence reasonably indicative of arbitrary action. On the contrary, it expressly recognized that right in its opinion in this case (179 Ga. 471), as well as in an earlier opinion from which it quoted (*Georgia Power Co.* v. *Decatur*, 170 Ga. 699). The Court did no more than to hold that, treating the proffered testimony as accepted rather than rejected, it was insufficient to establish any inference of arbitrary oppression. Compare *Branson* v. *Bush*, 251 U. S. 182, 190, 191; *Mt. St. Mary's Cemetery* v. *Mullins*, 248 U. S. 501; *Embree* v. *Kansas City Road District*, 240 U. S. 242. For that reason the testimony was correctly held to be "immaterial," and the error, if any, "harmless."

A street must be properly paved, for the safety and convenience of travelers, as well as for the good of abutting owners. A resolution of the city authorities that a new pavement has become necessary, and assessing the cost according to an estimate of benefits, is not to be undone because the railway is of the opinion that for the operation of its business the old pavement is good enough.

Mr. Justice BRANDEIS and Mr. Justice CARDOZO join in this opinion.